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EDITOR'S NOTE

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No. 86-286-CFY
Status: GRANTED

Title: James E. Gray, Petitioner
v.
United States

Docketed:
August 22, 1986

Court: United States Court of Appeals
for the Sixth Circuit

Vide:
86-234

Counsel for petitioner: Shuffett, James A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1986	G	Petition for writ of certiorari filed.
3	Sep 26 1986		Order extending time to file response to petition until October 26, 1986.
4	Oct 20 1986		Order further extending time to file response to petition until November 19, 1986.
5	Nov 19 1986		DISTRIBUTED. December 5, 1986
6	Nov 19 1986	X	Brief of respondent United States in opposition filed. VIDED.
7	Dec 8 1986		Petition GRANTED. The case is consolidated with 86-234, and a total of one hour is allotted for oral argument.
8	Dec 20 1986	G	Motion of The Solicitor General to dispense with printing the joint appendix filed.
9	Jan 12 1987		Motion of The Solicitor General to dispense with printing the joint appendix GRANTED.
11	Jan 9 1987		Order extending time to file brief of petitioner on the merits until February 2, 1987.
12	Jan 31 1987		Brief of petitioner Charles J. McNally filed. VIDED.
13	Jan 31 1987		Brief of petitioner James E. Gray filed. VIDED.
14	Feb 11 1987	D	Motion of petitioners for divided argument filed.
15	Feb 13 1987		Record filed.
16	Feb 13 1987		Certified copy of original record and proceedings, 2 boxes, received.
17	Feb 23 1987		Motion of petitioners for divided argument DENIED.
19	Mar 4 1987		Order extending time to file brief of respondent on the merits until March 20, 1987.
20	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 22, 1987. This case is consolidated with No. 86-234. (4th case) (1 hour).
21	Mar 20 1987		Brief of respondent United States filed. VIDED.
22	Mar 25 1987		CIRCULATED.
23	Apr 8 1987	X	Reply brief of petitioner James E. Gray filed. VIDED.
24	Apr 10 1987	X	Reply brief of petitioner Charles J. McNally filed. VIDED.
25	Apr 22 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-286

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES E. GRAY..... Petitioner

versus

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "intangible rights" doctrine applied to public officials under the mail fraud statute should be extended to include the chairman of a political party, who does not hold public office?

2. Whether, in a mail fraud case, a Court of Appeals may base its decision on the concealment of facts by a fiduciary, under the intangible rights doctrine, when in fact the District Court withdrew that issue from the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged?

3. Where the trial court submits a case to the jury on alternate theories and the verdict returned is a general one, should the Court of Appeals consider the sufficiency of the evidence on both theories on appeal?

4. In addition, the Petitioner, James E. Gray, adopts by reference the Questions Presented For Review by his Co-Defendant, Charles J. McNally, in his Petition for Writ of Certiorari filed on or about the same date as this Petition.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO.

JAMES E. GRAY..... *Petitioner*

V.

UNITED STATES OF AMERICA..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on May 12, 1986, affirming the Petitioner's conviction for violation of Title 18, United States Code, Sections 371 and 1341.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the Petitioner's conviction was entered on May 12, 1986, and is reported at 790 F.2d 1290 (6th Cir. 1986), and appears in the Appendix to this Petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on May 12, 1986. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by the Petitioner on May 23, 1986, and said Petition was denied by Order of the Court of Appeals entered and filed on June 27, 1986.

This Petition for Writ of Certiorari was served and filed within sixty (60) days of June 27, 1986. This Court's jurisdiction is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

STATUTORY PROVISIONS

Title 18, United States Code, Section 371, provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 1341, provides:

Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The Petitioner, James E. Gray, and a Co-Defendant, Charles J. McNally, were concicted, after a six-week trial, on one count of conspiracy in violation of Title 18, United States Code, Section 371, and one count of mail fraud in violation of Title 18, United States Code, Section 1341. The trial court had jurisdiction of the charges by virtue of Title 18, United States Code, Section 3231. The facts leading to their indictment and trial appeared as follows:

Since 1971, Kentucky had purchased workmen's compensation insurance through the Wombwell Insurance Agency of Lexington, Kentucky. The policy was awarded to Wombwell after its vice-president,

Robert Tabeling, agreed with certain then political leaders to pay a percentage of the commissions resulting from the policy to other insurance agents as designated by those political leaders.

In 1974, Julian M. Carroll became governor of Kentucky. Shortly thereafter, Howard P. Hunt was selected as chairman of the Kentucky Central Executive Committee of the Democratic Party. To insure awarding the Kentucky workmen's compensation insurance policy to Wombwell, Tabeling conferred with Hunt on several occasions during the spring of 1975 to discuss the subject. At one of those meetings, Hunt advised Tabeling and Mr. Wombwell that Wombwell could retain the workmen's compensation insurance policy for the forthcoming year, commencing July 1, 1975, and thereafter, if it would agree to share a percentage of the insurance commissions with other insurance agents. Tabeling and Wombwell agreed to service the policy for $50,000.00 per year. In turn, Wombwell agreed to pay all commissions it received in excess of $50,000.00 per year to any authorized insurance agencies specified by Hunt. This arrangement was maintained, with minor adjustments, throughout the Carroll administration.

From 1975 to 1979, the award of the workmen's compensation insurance policy was accomplished by the then insurance commissioner, Harold McGuffey, recommending Wombwell to the State personnel department who purchased the insurance. Wombwell then contracted with an insurance underwriting company, The Hartford Insurance Group, to write the policy.

During the Carroll administration, Hunt directed Wombwell to pay twenty-one separate designated insurance agencies the sum of $851,000.00 from the commissions resulting from the workmen's compensation insurance policy commission payments it received for this period. Of the $851,000 in commissions paid by Wombwell to other agencies, nine

checks totaling $200,000.00 were issued to Seton Investments, Inc. In addition, Mr. McNally recived $77,500.00 through the Snodgrass Insurance Agency during this period.

The government had originally stipulated that McNally was an officer, director and the sole recorded stockholder of Seton Investments from September, 1975 until December, 1981. However, during the trial the government changed its position and attempted to prove that Seton Investments, Inc. was controlled by Hunt and Gray. No evidence was ever presented that Gray ever owned a single share of stock in Seton Investments, Inc. or Hunt. In addition, no evidence was ever presented that Gray ever received a single penny of the commissions. In fact, the evidence was undisputed that Gray, while having served as an original officer and director of Seton inthe fall of 1975, had resigned from the corporation in all respects prior to it ever receiving any insurance commission checks. The government attempted to prove that the proceeds from the insurance checks were used to purchase a condominium in Lexington, Kentucky, that was rented from Seton by a friend of Gray. The evidence, however, was undisputed that the condominium had been purchased in September of 1975 and that Seton did not receive any insurance checks until 1976.

In January of 1976, Governor Carroll appointed Gray as Secretary of Public Protection and Regulation. As such Secretary, Gray's duties included serving as liaison between the Governor and the Department of Insurance. Actual supervisory authority over the Department of Insurance lay with the insurance commissioner. Gray had no authority whatsoever over the Department of Personnel, which actually purchased the workmen's compensation policies.

Gray and McNally were indicted under a multiple-count indictment charging that they conspired with

each other and with Mr. Hunt to commit mail fraud, with the following objectives:

(a) to devise and intend to devise a scheme and artifice to:

(1) defraud the citizens of the Commonwealth of Kentucky of their right to have the Commonwealth's business conducted honestly, etc.; and,

(2) defraud the citizens of the Commonwealth of Kentucky of their right to have available and be made aware of all relevant and pertinent facts and circumstances when selecting an insurance agent to write the State's workman's compensation policy; and,

(3) obtain directly and indirectly, money and other things of value, by means of false and fraudulent pretenses, etc.

(b) to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment and collection of federal taxes.

In addition, they were indicted for eight additional substantive mail fraud counts with the same objectives. Six of the substantive mail fraud counts were dismissed by the District Court and the dismissal of same was affirmed on the Government's appeal, which was consolidated with Gray and McNally's appeal in the U.S. Court of Appeals for the Sixth Circuit.

After a six-week trial, Gray and McNally were convicted on both the conspiracy count and the one remaining substantive mail fraud count.

On appeal to the United States Court of Appeals for the Sixth Circuit, Gray argued, *inter alia*, that the "intangible rights" doctrine, which has been developed under the mail fraud statute, should not be expanded to encompass persons who do not hold public office, and that the evidence was insufficient to sustain a conviction on both the "intangible rights" doctrine and the "Klein" theory of impeding the Treasury.

The Sixth Circuit, in affirming the convictions, followed the case of *United States v. Margiotta*, 688 F 2d. 108 (2nd Cir. 1982), *cert. denied*, 461 U.S. 913 (1983), and held that the "intangible rights" doctrine could be applied to Mr. Hunt as Democratic Party Chairman. In addition, notwithstanding that the jury verdict was a general one, it refused to, in footnote number 2, examine the sufficiency of the evidence on the "Klein" theory of impairment of the IRS upon the basis that since it had found that the first objective of the conspiracy had been proven, it did not need to examine the evidence on the alternate objective. The government's "Klein" theory was that the commission income paid to Seton and reported on its tax returns actually belonged to Hunt and Gray, and because the government could not prove their ownership of Seton or their entitlement to the commissions, they must have impeded the IRS. Further, the Sixth Circuit substantially based its opinion upon objective (a) (2) above (the right of the citizens to be made aware of relevant facts when expending state funds), even though the trial court withdrew that issue from the jury and the jury could not have based its verdict upon same.

The Petitioner, James E. Gray, therefore respectfully requests the Court to examine the following three questions, those other questions fairly included therein, and those issues presented by Co-Defendant, Charles J. McNally.

1. Whether the "intangible rights" doctrine applied to public officials under the mail fraud statute should be extended to include the chairman of a political party, who does not hold public office?

Whether, in a mail fraud case, a Court of Appeals may base its decision on the concealment of

facts by a fiduciary, under the intangible rights doctrine, when in fact the District Court withdrew that issue from the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged?

3. Where the trial court submits a case to the jury on alternate theories and the verdict returned is a general one, should the Court of Appeals consider the sufficiency of the evidence on both theories on appeal?

ARGUMENT

1. *Whether the "intangible rights" doctrine applied to public officials under the mail fraud statute should be extended to include the chairman of a political party, who does not hold public office?*

This is an important question of federal law which has not been, but should be, settled by this Court.

The extension of the mail fraud statute to "intangible rights" is a comparatively recent and perhaps still a controversial development. A number of circuits have interpreted Title 18, United States Code, Section 1341, as proscribing schemes to defraud the citizens of a state of their intangible rights to honest and impartial government, as well as an alleged right to full disclosure of material facts, such as conflicts of interest, which would arise from agreements calculated to generate personal gains at the expense of the public. For example, *see, United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), *aff'd. in relevant part,* 602 F.2d 653 (4th Cir. 1979) (*en banc*), *cert. denied,* 445 U.S. 961 (1980). The theory underlining these cases is that a public official is a "trustee for the citizens and the state...and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty." *United States v. Mandel,* 591 F.2d at 1363. As the *cestui,* the public is entitled to the faithful and disinterested services of its servant and employee, and a public official may not lawfully deprive the public of that right. A statutory violation may also result where the fiduciary deliberately conceals material information that he is under a duty to disclose and where that nondisclosure could or does result in harm to another. *United States v. Mandel,* 591 F.2d 1347; *United States v. Bronston,* 658 F2d 920, 926 (2nd Cir. 1981).

At the core of the "intangible rights" theory, in the governmental context, is the Defendant's misuse of his public office for personal profit. "This doctrine of the deprivation of honest and faithful service has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage..." *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976). At the same time, misconduct by a public official that occurs in his personal capacity, or which does not involve misuse of his official position, results in no breach of his official fiduciary duty and no violation of the mail fraud statute. *United States v. Rabbitt,* 583 F.2d 1014 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979).Further, proof of active fraud, rather than just constructive fraud, is necessary. *Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949).

Other than the case at bar, *United States v. Margiotta,* 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983), is the only case to hold that a party chairman owes a fiduciary duty to the general public. The case at bar, by use of the conspiracy statute, expanded the matter to persons accused of conspiring with such a party chairman.

This Court has never recognized the existence of

the "intangible rights" doctrine and has certainly never approved the extension of same to political party leaders, who hold no public office.

This is an important question of federal law for several reasons. It is the very nature and function of a party official to further the interests of that party and its members in a *partisan* manner. Imposition of a contradictory duty on the part of an officer of a partisan political organization to render "disinterested" and "loyal" services to the public at large works a breach of his fiduciary duty of loyalty to the party and its members.

This new fiduciary doctrine poses significant First Amendment problems. Individuals can be denied the right of political advocacy if party officials are required to be disinterested and to act for the benefit of the entire electorate. This would also apply to the activities of lobbyists on behalf of political party positions and could, therefore, constitute an infringement upon the right of petition. Anyone who attempts to lobby governmental officials in his own self-interest is in danger of being prosecuted with this interpretation of the statute.

This interpretation puts a very powerful weapon in the hands of prosecutors to construe political activities with which they do not agree as "mail fraud". As stated by Judge Winter, in dissent, in *Margiotta*, at 143:

> ....I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power, the freeswinging club of mail fraud affords federal prosecutors.

And at 144:

> ....The problem is that in stretching the mail fraud statute to fit this case, we create a crime which applies equally to persons who have not done the evil things Margiotta is said to have done, a catch-all political crime which has no use but misuse. After all, the only need served by resort to mail fraud in these cases is when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct. But that use creates a danger of corruption to the democratic system greater than anything Margiotta is alleged to have done. It not only creates a political crime where Congress has not acted, but also lodges unbridled power in federal prosecutors to prosecute political activists. When the first corrupt prosecutor prosecutes a political enemy for mail fraud, the rhetoric of the majority about good government will ring hollow indeed.

This is an important question of federal law and should be settled by this Court. This question will permit this Court to determine if an "intangible rights" doctrine does exist and what, if any, are its parameters. Counsel submits that this question meets the requirements of Rule 17.1 (c) of the Rules of the Supreme Court and that this Petition for Writ of Certiorari should be granted.

2. *Whether, in a mail fraud case, a Court of Appeals may base its decision on the concealment of facts by a fiduciary, under the intangible rights doctrine, when, in fact, the District court withdrew that issue from the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged*?

This is an important issue of federal law which has not been, but should be, settled by this court. Also, this decision appears to have been decided in a way in conflict with applicable decisions of this Court, and this case decides this federal question in a way in conflict with the decisions of other federal Courts of Appeals.

The opinion of the United States Court of Appeals for the Sixth Circuit in the case at bar, throughout and particularly at page 8 of the Slip Opinion, paragraphs 1 and 3, substantially relies upon the concealment of facts by a fiduciary (in violation of the citizens' right to know relevant facts) as a basis for its affirming the District Court judgment. *In fact*, the trial court withdrew that issue from the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged. The panel of the Sixth Circuit no doubt logically assumed that the jury was instructed, as usual, by incorporating the charge as originally made in the indictment. At pages 4 and 5 of the Slip Opinion, the panel quotes the charge in Count 1, which included:

> a. To devise and intend to devise a scheme and artifice to:
>
> > (1) ...; and (2) defraud the citizens of the Commonwealth of Kentucky, and its governmental departments, ... of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when selecting an insurance agent to wrote the Commonwealth of Kentucky's Workmen's compensation Insurance Policy;.....

In fact, all of the foregoing was withdrawn when the trial court instructed the jury. Partial Transcript of Trial, March 5 and 6, 1984, at page 25, shows this clearly:

> MR. JOHNSON: Your Honor, in this situation we have an indictment that has been cut up in such a fashion that it would be highly prejudicial.
> THE COURT: Well, there's no problem about count 1, is there?
> MR. SHUFFETT: Your Honor, yes there is. You took out the second head --
> THE COURT: That's true.
> MR. JARRETT: I didn't follow that, Judge. Could you repeat that?
> MR. SHUFFETT: There were three parts to the head; part B was omitted --
> THE COURT: I took out that part about the right to be made aware of all relevant and material factors. That's right.

This is further clearly shown by Instructions & Verdict, Vol. XXVII, Pages 27-15 and 27-16, Instruction No. 11 (relating to count 1), and Page 27-24, Instruction No. 15 (relating to Count 4).

It is, therefore, clear that with regard to the "citizens' right to know facts" (and corresponding concealment by a fiduciary) portion of the intangible rights theory as charged in the indictment, the trial court's action constituted the entry of a Judgment of Acquittal as to that portion. It, therefore, follows that the panel of the Sixth Circuit should not have based its affirmance upon such premises.

This decision appears to squarely conflict with *United States v. Giampa,* 758 F.2d 928, 932 (3d Cir. 1985), where the court held:

> ...The Supreme Court warned that " we have emphasized that what constitutes an acquittal is not to be controlled by the form of the judge's action . . . Rather we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571, 97 S.Ct. at 1355 [quoting from *United States v. Martin Linen Supply,* 430 U.S. 564, 97 S. Ct. 1349 (1977)].

The case at bar also appears to conflict with the principles in *United States v. Schwartz,* 785 F.2d 673 (9th Cir. 1986) and *United States v. Genser,* 710 F. 2d 1426 (10th Cir. 1983).

Matters such as these usually arise upon an appeal by the government from a judgment of acquittal or order of dismissal. *See,* for example, *United States v. Martin Linen Supply,* 430 U.S. 564 (1977) and *Sanabria v. United States,* 437 U.S. 54 (1978). In the case at bar, this matter apparently resulted from an invalid assumption on the part of the panel for the Sixth Circuit. This was called to the attention of the Court with a request for a rehearing in the Petition for Rehearing of the petitioner, a copy of which is contained in the Appendix to this Petition for Writ of Certiorari. The panel for the Sixth Circuit entered only its routine printed order overruling the Petition and did not address this request for rehearing specifically.

This is an important question of federal law and it should be settled by this Court. Likewise, it appears to be in conflict with the decisions of the Third, Ninth and Tenth Circuits and decisions of this Court. Counsel submits that this question meets the requirements of Rules 17.1 (a) and 17.1

(c) of the Rules of the Supreme Court and that this Petition for Writ of Certiorari should be granted. In addition, counsel submits that this issue may warrant summery action directing the Sixth Circuit to re-examine the Petition for Rehearing.

3. *Where the trial court submits a case to the jury on alternate theories and the verdict returned is a general one, should the Court of Appeals consider the sufficiency of the evidence on both theories on appeal?*

This is an important question of federal law which has not been, but should be, settled by this Court. In addition, the case at bar is in conflict with the decisions of the United States Courts of Appeals for the Third, Seventh, Ninth and Eleventh Circuits.

This issue arises out of cases where the goverment presents a conspiracy or mail fraud indictment and has multiple objects of the conspiracy or multiple descriptions of the scheme to defraud. The indictment is brought in the *conjunctive*, and in effect says the Defendant is charged with a conspiracy to accomplish object (a) and object (b). When time to instruct the jury arrives, the trial court instructs in the *alternative*, saying to the jury that they may convict if they unanimously agree on either of the objects. The jury then returns a general verdict and it is not possible to tell which object they unanimously agreed upon, or perhaps both objects. On appeal, it should then be incumbent upon the appellate court to examine the sufficiency of the evidence on both objects, since in the event the jury agreed on object (a) but not object (b), the defendants would certainly have a right to have the sufficiency of that evidence reviewed by the appelate court. In the

case at bar, object (a) was the three-headed intangible rights doctrine and object (b) was the "Klein" theory of impeding and impairing the Internal Revenue Service in its functions.

The "Klein" tax objective originated in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), which outlined what is sufficient to establish a conspiracy to defraud the United States by impeding and obstructing the lawful governmental functions of the Internal Revenue Service. In *Klein*, the defendants set up numerous Canadian, Cuban and Panamanian corporations to create the appearance that substantial profits had been earned out of the United States by foreign corporations, and thereby decrease substantially their taxable income to be reported. At page 915, the Court summarized the various acts of concealment of the defendants:

> We summarize the acts of concealment of income which the jury might have found, pointing out that, as indicated, some of these are alternatives: (1) alteration of the books of Tivoli to make liquidating dividendends appear as commissions; (2) alteration of those books to make a gratuitous payment of $1,500,000 from Tivoli to Regan Potter appear as repayment of a loan; (3) a false entry in the Tivoli books to disguise as commissions paid what was actually a dividend paid to Klein which he diverted to Cuban corporate nominees of his personal friends; (4) a false entry in the Tivoli books to disguise as a commission paid the $35,000 paid to Haas' LaRibera corporation; (5) the removal of $8,000,000 in bonds from New York to Canada; (6) the false statement in Klein's personal income tax return for 1947 to the effect that he purchased stock in

> Tivoli from the three Canadians for $375,000; (7) the false statement in the same return to the effect that Tivoli had "contingent liabilities" when it sold its assets to Hannes; (8) Klein's false answer in 1949 to Treasury interrogaories seeking him to identify the owners of various Cuban corporations and to state the nature and amount of funds paid to them by Tivoli; (9) Klein's false answer at the same time regarding his purchasing Tivoli from the three Canadians; (10) Roer's false return for 1950 in which he claimed that he sold Tivoli stock in that year for an immense profit; (11) Alrin's false statement to Treasury officials in 1952, claiming that his draft was in liquidation of his interest in Tivoli; (12) Koerner's false statement at the same time to the same effect; (13) Roer's similar statement; (14) Haas' corroborating statement; (15) Klein's signing his 1949 interrogatories in 1952; (16) Klein's statement in 1952 clinging to his earlier position and denying that the drafts were in liquidation of Tivoli; (17) Klein's 1952 implication to the Treasury that the true value of Regan Potter could be obtained without treating as one its assets the $1,500,000 due to Regan Potter from Tivoli in repayment of a loan; (18) Rokoff's evasive affidavit in 1953 denying that he remembered altering the Tivoli books; (19) Koerner's 1952 income tax return which falsely claimed a sale of Tivoli stock in 1952; (20) Alprin's 1952 income tax return, which made an identical false claim.

Thus, the court held in *Klein* that the evidence was sufficient to establish a conspiracy to impede and obstruct the Internal Revenue Service.

In the case at bar, Seton purchased two condominiums, one in Lexington and one in Florida,

and an automobile to stay at the Florida condominium. Michelle Johnson, a friend of Gray's, lived in the Lexington condominium and paid rent to Seton. There was some testimony that the amount of rent may have been slightly below market value, but was defended by the Defendants upon the grounds that Ms. Johnson was an officer of the corporation and performed bookkeeping and bill-paying services for the corporation. Further, McNally testified that he preferred to have Ms. Johnson as tenant, even at a slightly reduced rent, because she helped look after the property, and because he did not want to face a constant turnover of tenants. In December of 1981, McNally, the sole owner of the stock in Seton corporation, sold all his stock, thereby disposing of all of the assets of Seton. On his personal tax return, McNally recognized as a capital gain the entire selling price less his initial investment. During the years that Seton received insurance commissions, it filed state and federal tax returns reporting as income the entire amount of commissions received. McNally and Alan Hunt reported as income on their individual returns all the commissions they received. Gray did not receive a single penny of the commissions, and, therefore, did not report any commission income.

The government claimed that the commissions belonged to Hunt and Gray, rather than Seton, and that because it could not prove any ownership of Seton in Hunt or Gray, that the IRS was obviously impeded.

On appeal, the Petitioner, James E. Gray, made substantial arguments as to the sufficiency of the evidence on both objectives. The panel for the Sixth Circuit held that it would not examine the sufficiency of the evidence on the *Klein* objective since it had found that the evidence was sufficient

on the intangible rights objective. At footnote 2, it stated:

> The indictment in the case at bar charged a conspiracy encompassing two objects: (1) a scheme to deprive the citizenry of Kentucky of certain intangible rights, and (2) a scheme to impair the federal government in the assessment of taxes. Because the government had demonstrated beyond a reasonable doubt that the defendants engaged in a conspiracy with the purpose of depriving the citizens of their intangible rights, it is not now necessary to consider defendants' contention that the evidence was insufficient to support a conviction based on the tax objectives alleged in the indictment.

The decision by the Sixth Circuit in the case at bar directly conflicts with *United States v. Tarnopol*, 561 F.2d 466, 473-475 (3d Cir. 1977), where the Court held:

> It follows that there was a failure of proof with respect to this particular alleged objective of the conspiracy. Accordingly, since we cannot know whether or not the jury based its verdict upon this objective alone, the verdict of guilty on Court 1 cannot stand. *United States v. Dansker,* 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977)...

The decision in the case at bar also conflicts directly with *United States v. Berardi*, 675 F.2d 894, 902 (7th Cir. 1982), *United States v. Talkington*, 589 F.2d 415, 417-418 (9th Cir. 1979), and *United States v. Pepe*, 747 F.2d 632, 667 (11th Cir. 1984).

Again, the panel of the Sixth Circuit declined to even specifically address this matter upon the Petition for Rehearing, which is a part of the Appendix herein. It is an important question of fed-

eral law and it should be settled by this Court. It certainly is in direct conflict with the decisions of four (4) other Circuits and meets the requirements of Rules 17.1(a) and 17.1(c) of the Rules of the Supreme Court. This Petition for Writ of Certiorari should be granted.

CONCLUSION

For all of the foregoing reasons and the reasons of Co-Defendant Charles J. McNally in his separate Petition, a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this action. In addition, counsel submits that the case at bar is appropriate for summary action directing the panel for the Sixth Circuit to re-examine the issues contained in the Petition for Rehearing in the Appendix to this Petition for Writ of Certiorari.

Respectfully submitted,

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COUNSEL FOR PETITIONER,
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CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE

James A. Shuffett hereby certifies that this Petition for Writ of Certiorari has been served upon the United States of America by mailing three copies of same, first-class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 22nd day of August, 1986 Rules of the Supreme Court 28.3, 28.4(a), 28.5, 28.5(b), 19.3. All parties required to be served have been served.

James A. Shuffett hereby enters an appearance on behalf of the Petitioner, James E. Gray. Rules of the Supreme Court 28.5(b), and 19.3.

JAMES A. SHUFFETT
Member of the Bar of the
Supreme Court of the
United States

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

Nos. 84-5033, 84-5400, 84-5401

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant
(84-5033),
Plaintiff-Appellee
(84-5400/5401),

v.

JAMES E. GRAY and
CHARLES J. MCNALLY,
Defendants-Appellees
(84-5033),
Defendants-Appellants
(84-5400/5401).

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed May 12, 1986

Before: JONES and KRUPANSKY, Circuit Judges; and NEESE, Senior (retired District) Judge.*

A per curiam opinion was delivered by the court. NEESE,

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*Hon. Charles G. Neese, Senior (retired District) Judge from the Eastern District of Tennessee, sitting by designation.

Senior (retired) District Judge, (pp. 15-16) delivered a separate opinion concurring in part and dissenting in part.

PER CURIAM. Defendants James E. Gray (Gray) and Charles J. McNally (McNally) appealed their convictions on one count of conspiring to devise a scheme to defraud in violation of 18 U.S.C. § 371 and one count of aiding and abetting in the use of the mails to defraud in violation of 18 U.S.C. §§ 2 and 1341. The United States, in a separate appeal, challenged the trial court's dismissal of six counts of substantive mail fraud charged in the indictment.

Since 1971, Kentucky had purchased workmen's compensation insurance through the Wombwell Insurance Agency of Lexington, Kentucky (Wombwell). The policy was awarded after its vice president, Robert Tabeling (Tabeling), agreed with certain political leaders then in power to pay a percentage of the commisssion resulting from the policy to other insurance agents as designated by those politicians.

The operative facts are easily summarized. In 1974, Julian M. Carroll became governor of Kentucky. Shortly thereafter, Howard P. "Sonny" Hunt (Hunt)[1] was selected Kentucky Democratic Party Chairman. To ensure awarding the Kentucky workmen's compensation insurance policy to Wombwell, Tabeling conferred with Hunt on several occasions during the spring of 1975 to discuss the subject. At one of those meetings, Hunt advised Tabeling and Joseph H. Wombwell that Wombwell could retain the workmen's

[1]Hunt pled guilty to one count of intangible rights mail fraud for his role in the scheme which is the focal point of the instant case.

compensation insurance policy for the forthcoming year, commencing July 1, 1975, and thereafter if it would agree to "share" or kickback a percentage of the insurance commissions. Tabeling and Wombwell agreed to service the policy for $50,000 per year. In turn, Wombwell agreed to pay all commissions it received in excess of $50,000 per year to any authorized insurance agencies specified by Hunt. This arrangement was maintained, with minor adjustments, throughout the Carroll Administration.

From 1975 to 1979, the annual award of the workmen's compensation insurance policy followed a set procedure. Insurance Commissioner Harold McGuffey (McGuffey) received directions from Hunt, who consistently directed McGuffey to award the workmen's compensation insurance policy to Wombwell, and McGuffey would execute Hunt's decision. Wombwell then contracted with an insurance underwriting company, the Hartford Insurance Group, to write the policy

During the Carroll Administration, Hunt directed Wombwell to pay twenty-one separate designated insurance agencies the sum of $851,000 from the commissions resulting from the workmen's compensation insurance policy premium payments it received for the period here in issue. Of the $851,000 of excess commissions paid by Wombwell to the other agencies, nine checks totaling $200,000 were issued to Seton Investments, Inc.

The success of the defendant's scheme depended upon the use of the mails to convey commission checks from the Hartford's home office in Connecticut to Wombwell's office in Kentucky.

The government originally stipulated the McNallly "was an officer, director, and sole recorded stockholder of Seton" from September, 1975 to December 1981. However, during the trial, the government's

evidence developed that Hunt and Gray were, in fact, the primary parties that controlled Seton until late 1977 or 1978. McNally received $77,500 in return for acting as Seton's frontman. The payments were made to him through the Snodgrass Insurance Agency, which received commission checks from Wombwell at Hunt's direction after McNally had prevailed upon his friendship with Ronald Snodgrass to permit his agency to act as a conduit for the $77,500 McNally received. McNally had assured Snodgrass that the procedure was not in violation of law.

The payments received by Seton from Wombwell were used to purchase a condominium in Lexington, Kentucky, another condominium in Juno Beach Florida and a 1976 Ford Country Squire station wagon for use at the Florida Condominium. The condominiums and the station wagon were exclusively at the disposal of Gray and Hunt. In addition to the foregoing, Seton gratuitously provided Hunt's son Alan with seven checks totaling $38,500.

In January of 1976, Governor Carroll appointed Gray as Secretary of Public Protection and Regulation. While Secretary of Public Protection and Regulation, Gray had supervisory authority over McGuffey. Gray also served as Secretary of the governor's cabinet from January of 1977 until August of 1978. For approximately thirteen months, Gray occupied both of these positions. Although McNally, a Prestonburg, Kentucky businessman, served in no public office, he was a staunch political ally of Governor Carroll.

Defendants Gray and McNally were indicted by a federal grand jury on June 30, 1983. Count one of the indictment charged that defendants Gray and McNally "did knowingly, willfully and unlawfully conspire, ... with each other and with ... Hunt ...

to commit certain offenses against the United States" with the following objectives:

a. To devise and intend to devise a scheme and artifice to:

(1) defraud the citizens of the Commonwealth wealth of Kentucky and its governmental departments, agencies, officials and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and (2) defraud the citizens of the Commonwealth of Kentucky, and its governmental departments, agencies, officials and employees, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when selecting an insur-ance agent to write the Commonwealth of Kentucky's Workmen's Compensation Insurance Policy; when committing and expanding the funds of the Commonwealth of Kentucky to pay for said insurance; and (3) obtain, directly and indirectly, money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

And, for the purpose of executing the aforesaid conspiracy, the Defendants, James E. Gray and Charles J. McNally, and Howard P."Sonny" Hunt, Jr. and others, did place and cause to be placed in a post office or authorized depository for mail matter, matters and things to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom such matters and things and did knowingly cause

to be delivered by mail according to the direction thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

b. To defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue service of the Treasury Department of the United States of America, (Hereinafter the Internal Revenue Service) in the ascertainment, computation, assessment, and collection of federal taxes.

Counts two through eight detailed seven separate charges of aiding and abetting the substantive offense of mail fraud in violation of 18 U.S.C. § 2 and § 1341. Count four alleged mail fraud in connection with the mailing of a commission check addressed to Wombwell. Counts two, three, five, six, seven and eight alleged mail fraud in connection with the mailing of Seton's corporate tax returns.

On December 16, 1983, the district court dismissed counts two, three, five, six, seven and eight because the indictments failed to allege that Seton's tax returns identified in those substantive charges were themselves false or fraudulent. A jury trial on counts one and four commenced on January 23, 1984. On March 6, 1984, defendants Gray and McNally were convicted on both counts.

As outlined in Count one of the indictment, Gray and McNally were charged with conspiring to commit acts of mail fraud the object of which was to deny the citizens of Kentucky certain "intangible rights," such as the right to have the Commonwealth's business conducted honestly, impartially and free from corruption and official misconduct, together with the right to a full and complete disclosure of the practices and procedures employed in awarding the state's

workmen's compensation insurance policy. Courts have long interpreted the mail fraud statute, 18 U.S.C. § 1341, as proscribing schemes to defraud the citizens of the intangible rights to honest and impartial government. *See, e.g., United States v. Von Barta,* 635 F.2d 999, 1005-06(2dCir.1980;, *cert. denied,* 450 U.S. 998 (1981); *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979) *aff'd in relevant part* 602 F.2d 656 (4th Cir. 1979)(en banc), *cert. denied,* 445 U.S. 961 (1980); *United States v. Keane,* 522 F.2d 534 (7th Cir. 1975), *cert. denied,* 42 U.S. 976 (1976); *United States v. States,* 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); *Shushan v. United States,* 117 F.2d 110, 115 (5th Cir.), *cert denied,* 313 U.S. 574 (1941).

The cited cases are premised on an underlying theory that a public official acts as "trustee for the citizens and the State ... and thus owes the normal fiduciary duties of a trustee, *e.g.,* honesty and loyalty to the citizens and the State. *United States v. Mandel,* 591 F.2d at 1363. The logic continues that, as the *cestui,* the public is entitled to the faithful and disinterested services of government servants and employees, and a public official may not deprive the public of its rights. As succinctly explained by the Seventh Circuit:

> A scheme to defraud the citizenry and government of an intangible right, such as honest service, can be contrasted with a scheme to obtain tangible property through fraud. A scheme to obtain tangible property is cognizable under the mail fraud statute regardless of the relationship between the defendant and his victim. In contrast, an intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity.

U.S. v. Alexander, 741 F.2d 962, 964 (7th Cir.)(citations omitted).

Within the above context, the "intangible rights" theory is anchored upon the defendant's misuse of his public office for personal profit. "This doctrine of the deprivation of honest and faithful service has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage ...." *United States v. Dixon,* 536 F.2d 1388, 1400 (2d Cir. 1976). Conversely, misconduct of a fiduciary in the aministration of exclusively private matters in his capacity as a private individual which does not involve the misuse of public office or public trust, is not actionable as a violation of the mail fraud statuate under an intangible rights theory. *United States v. Rabbitt,* 583 F.2d 1014,1024 (8th Cir. 1978) *cert. denied,* 439 U.S. 1116 (1979).

A mail fraud conviction can be supported by proof that a fiduciary who is charged with a public trust deliberately concealed facts to personally benefit from the actions of a public official or public entity. Under such circumstances, the public fiduciary breaches the public trust by intentionally avoiding a full and complete disclosure of conflicts of interest arising from surreptitiously conceived and implemented agreements calculated to generate personal gains at the expense of the public. *Unites States v. Mandel,* 591 F.2d 1347, 1364 (4th Cir. 1979).

Only one member of the conspiracy need be a public fiduciary to support an intangible rights mail fraud indictment against all members of the conspiracy. As explained by the Seventh Circuit in *U.S. v. Alexander,* 741 F.2d at 964: "[t]here can be no doubt that a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute."

In the instant case, the govenment predicated liability on both Gray's actual fiduciary status as an appointed public official who actively participated in the conspiracy and Hunt's fiduciary status as a de facto public official. The evidence adduced at trial demonstrated beyond a resonable doubt that the awarding of workmen's compensation insurance policy was within Gray's supervisory authority as Secretary of Public Protection and Regulation or as Secretary to the Governor's Cabinet, that Seton received commissions from the policy, that Gray failed to disclose his ownership interest in Seton, and that McNally aided and abetted Gray in perpetrating this fraud.

On appeal, defendants argued that Hunt was not a public official and hence, had no fiduciary duty to the public. However, serving in public office should not be a rigid prerequisite to impressing a fiduciary duty upon individuals closely aligned with governmental activities. Rather, an individual who has no formal employment relationship with government may nonetheless substantially participate in government operations so as to assume a fiduciary duty to the general citizenry. *United States v. Margiotta,* 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983.

In *Margiotta,* the Chairman of the Republican Committee of nassau County and the Town of Hempstead, New York appealed his mail fraud conviction, asserting that he had no fiduciary duty to the general citizenry of Nassau County and the Town of Hempstead. As County and Township Republican Chairman, Margiotta had sufficient authority and prestige to exert substantial influence over public officials in Hempstead and Nassau County. Exercising his influence, Margiotta directed a public official to appoint a specific insurance agency as Broker of Record for the County and the Town. There-

after, at Margiotta's command, the insurance agency distributed more than five hundred thousand dollars in kickbacks to both Margiotta and his political allies. The Second Circuit concluded that, although not a public official, Margiotta was subject to prosecution for intangible rights mail fraud as a public fiduciary.

Recognizing that there was no black letter rule for imposing a fiduciary responsibility upon a relationship between an influential political personality and the public, the Second Circuit offered the following guidelines:

> Although there is no precise litmus paper test, two time-tested measures of fiduciary status are helpful: (1) a reliance test under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary .... These tests recognize the important distinction between party business and government affairs permitting a party official to act in accordance with partisan preferences or even whim up to the point at which he dominates government. Accordingly, the reliance and de facto control tests carve out a safe harbor for the party leader who merely exercises a veto power over decisions affecting his constituency. *Margiotta*, F.2d at 122. (citations omitted).

The evidence adduced at this trial demonstrated beyond a reasonable doubt that Hunt substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to Wombwell and the payment of monetary kickbacks

to Seton. Hunt testified that he had directed McGuffey to award the workmen's compensation policy to Wombwell and that he had further directed Wombwell as to the amounts and manner in which the excess premium commissions were to be distributed. Hunt's exclusive domination over the government operation, as corroborated by the testimony of McGuffey, Tabeling, Gray and McNally, placed him into the position of a de facto public official who assumed a fiduciary duty to the citizens of Kentucky. The evidence further demonstrated that Hunt failed to disclose his ownership in Seton, that Seton received kickbacks from the commission payments paid on the policies here in issue and that Gray and McNally aided and abetted Hunt's fraud.[2]

Defendants on appeal argued that their due process rights were infringed because the indictment was not "a plain, concise and definite written statement of the essential facts constituting the offense charged" as mandated by Fed.R.Crim.P.

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[2]The indictment in the case at bar charged a conspiracy encompassing two objects: (1) a scheme to deprive the citizenry of Kentucky of certain intangible rights, and (2) a scheme impair the federal government in the assessment of taxes. Because the government had demonstrated beyond a reasonable doubt that the defendants engaged in a conspir-a-y with the purpose of depriving the citizens of their intangible rights, it is not now necessary to consider defendants' contention that the evidence was insufficient to support a conviction based on the tax objectives alleged in the indictment.

7(c). Specifically, defendants urged that the indictment failed to allege that Hunt or Gray owed a fiduciary duty to the citizens of Kentucky or that the information which these individuals withheld from the public was material, and further omitted reference to the "intangible rights doctrine."

An indictment provides adequate notice to a defendant "when it permits the defendant to obtain 'significant protections which the guarantee of a grand jury indictment was intended to confer.' " *United States v. Piccolo,* 723 F.2d 1234, 1238, (6th Cir. 1983), *cert. denied,* 104 S.Ct 2342 (1984) (quoting *Russell v. United States,* 369 U.S. 749, 768 (1962)). The sufficiency of an indictment is governed by two "preliminary criteria":

> [F]irst, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " and, secondly, " 'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

Russell, 369 U.S. at 763-64.

The indictment in the case at bar presented the defendants with more than adequate notice of the offenses charged. The conspiracy count identified the principal co-conspirators, described their official positions, and specified both the detailed operations and objectives of the conspiracy. The mail fraud count disclosed similar factual details. In addition a bill of particulars, provided at defendants' request, identified Hunt, Gray, and McGuffey as the potential fiduciaries alluded to in the indictment,

explained the use of the term "excess commissions", provided defendants with a list of government witnesses, and disclosed other details about the case. In light of the foregoing, defendants cannot complain that they were not placed on notice of the charges against them.

See U.S. v. Goss, 650 F.2d 1336, 1346 n.11 (5th Cir. 1981)(Although indictment did not cast fraudulent scheme in terms of a breach of a fiduciary duty, it nonetheless apprised the defendant of the charges against him.).

Defendants also charged that the indictment was constructively amended during trial. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. Amend. V. Thus, a conviction cannot stand if it is based on an offense which is not charged in the grand jury's indictment. *United States v. Miller, 105 S.Ct. 1811, 1819 (1985).*

In *Stirone v. United States, 361 U.S. 212 (1960),* the Court stated that the charges in an indictment cannot be broadened through amendment except by the grand jury itself. Where a conviction is for an offense materially at variance with the offense charged in the indictment, it should be considered as unconstitutionally broadened and the conviction should be reversed. *Miller,* 105 S.Ct. 1817.

Defendants alleged further that the indictment was constructively amended because the government introduced evidence relating to Hunt's fiduciary duty and the actual ownership of Seton. However, as noted above, the indictment presented defendants with adequate notice of the essential elements of the offenses on which they were tried. Although the evidence concerning Hunt's fiduciary duty and the actual ownership of Seton was material to

defendant's guilt, the same evidence was also admissable as to the charges incorporated in counts one and four of the indictment..

Defendants also asserted that count four of the indictment was constructively amended by the district court's jury instructions relating to that count. Initially, it should be noted that no timely objection was taken to the court's charge. Moreover, jury instructions in a criminal case should not be analyzed in isolation, but rather must be evaluated in the context of the overall charge. *Engle v. Koehler,* 707 F.2d 241 (6th Cir. 1983), *aff'd,* 466 U.S. 1 (1983), (citing *Cupp v. Naughten,* 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). Because the instructions, when taken as a whole, did not create a substantial likelihood that defendants would be convicted of a crime not alleged in the indictment, this court concludes that count four of the indictment was not constructively amended. *United States v. Beeler,* 587 F.2d 340, 342 (6th Cir. 1978).

In its appeal, the govenment assigned as error the district court's dismissal of counts two, three, five, six, seven and eight of the indictment. Those counts of the indictment charged that the defendants aided and abetted the substantive offenses by mail fraud by filing Federal and State income tax returns in furtherance of a scheme to deprive the citizens of Kentucky of certain intangible rights and to obtain money and other things of value by false and fraudulent pretenses. The language of the counts tracked the statutory language of 18 U.S.C. §1341, the mail fraud statute, but did not allege that the tax returns filed on behalf of Seton were false or fraudulent.

An indictment that sets forth the offense in statutory language is sufficient so long as that language "fully, directly, and expressly, without any uncertainty or ambiguity, set[s] forth all the elements necessary to constitute the offense intended to be punished.' " *United States v. Groff,* 643 F.2d 396, 401 (6th Cir.), *cert. denied,* 454 U.S. 828 (1981) (quoting *Hamling v. United States,* 418 U.S. 87, 117 (1973). A conviction under the mail fraud statute requires proof of an intent to execute a scheme to defraud and the mailing of a letter, etc. for the purpose of executing that scheme. *United States v. Valvanis,* 689 F.2d 626, 627 (6th Cir. 1982). Gray and McNally reasoned that where, as here, a mail fraud offense was predicated upon the mailing of a document which a federal or state statute required to be mailed, the government shouldered the burden or proving an addditional element of the offense, namely, that the actual document mailed was false and fraudulent. Accordingly, defendants asserted that the counts dismissed by the district court were legally insufficient because they failed to allege that the tax returns filed on behalf of Seton were false and fraudulent.

In *United States v. Curry,* 681 F.2d 406, 412 (5th Cir. 1982), the fifth Circuit considered the quantum of proof required in a mail fraud case predicted upon the mailing of a document which an individual must, in law, place or cause to be placed in the mail:

> It is true that, ordinarily, the mailing of documents which are themselves innocent may still constitute the crime of mail fraud if the documents are mailed in execution of a scheme to defraud. *Parr v. U.S.,* 363 U.S. 370, 80 S. Ct. 1171, 1183, 4 L.Ed.2d 1277 (1960); U.S. *v Caldwell,* 544 F.2d 691, 696 (4th Cir. 1976); *U.S. v Reid,* 533 F.2d 1255, 1265 (D.C.Cir. 1976). However, mailings of documents which are required by law to be mailed, and which are not themselves false and fraudulent, cannot be regarded as mailed for

the purpose of executing a fraudulent scheme. *Parr v. U.S.* 80 S.Ct. at 1183.

Where the government charged mail fraud in connection with the mailing of a tax return, the indictment must specifically charge that the tax returns were themselves false and fraudulent.

The government argued that the indictment implicity alleged the falsity of the tax returns because count one, the conspiracy count, expressly charged that Seton's federal income tax returns were false. However, the section of count one that alleged that the returns were false was not specifically incorporated into the mail fraud counts. Although Federal Rule of Criminal Procedure 7(c) permits the government to incorporated in one count, allegations made in another count, the incorporation must be express, not implicit, *United States v. Roberts,* 465 F.2d 1373, 1375 (6th Cir. 1972); *United States v. Hajecate,* 683 F.2d 894, 901-902 (5th Cir. 1982), *cert. denied,* 461 U.S. 927 (1983).

For the reasons stated above, the defendants' convictions of counts one and four of the indictment are AFFIRMED. The district court's dismissal of counts two, three, five, six, seven and eight is also AFFIRMED.

NEESE, Senior (retired District) Judge, concurring in nos. 84-5400 and 84-5401 and dissenting in no. 84-5033.

I concur with the decision of the majority in affirming the respective convictions in nos. 84-5400 and 84-5401. However, I dissent respectfully from the majority's affirmance in no. 84-5033 of the dismissal of six counts of the pertinent indictment.

As to the latter, it has long been settled that there are two—and only two—elements of mail-fraud: (1) the existence of a scheme to defraud, and (2) the use of the mails for the purpose of

executing that scheme. *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 262, 98 L.ED. 435 (1954); *United States v. Bibby,* 752 F.2d 1116, 1125 (6th Cir. 1985), *cert. denied,* __U.S.__, 106 S.Ct. 1183,__LEd.2d__(1986); *Bender v. Southland Corp.,* 749 F.2d 1205, 1215-1216 (6th Cir. 1984). There is no justification in my view for the creation of a third element of this offense in situations where the mailing was required by law.

Parr v. United States, 363 U.S. 370, 390-392, 80 S.Ct. 1171, 1183-1184, 4 L.Ed.2d 1277 (1960), and *United States v. Curry,* 681 F.2d 406, 412 (5th Cir. 1982), teach that, where legally-compelled mailings are involved, the Government may not meet its burden of proving the mails were used "for the purpose of executing" the scheme to defraud by showing merely that the mailings took place; instead, the prosecution must prove something more, such as, that the documents mailed were themselves false or fraudulent. This is so because mailings of documents which are required by law to be mailed, and which are not themselves false or fraudulent, cannot "be regarded as mailed for the purpose of executing a plot or scheme to defraud". *Parr, supra,* 363 U.S. at 390, 80 S.Ct. at 1183.

When a person mails something which the law has mandated that he mail, the logical assumption is that he did so in obedience to law. Thus, to support a conviction for mail-fraud based on a legally-compelled mailing, the prosecution must show that the mailing occurred for the specific purpose of executing the scheme to defraud and not merely because the law required the mailing; otherwise, the Government has not met its burden of proving the second element of the offense. See *United States v. Buckley,* 689 F.2d 893, 900 (9th Cir. 1982) ("*Parr* involved a situation where the legally

compelled mailings were not made in furtherance of a scheme to defraud.")

Neither *Parr* nor *Curry* concerned the sufficiency of an indictment; they dealt, rather, with the sufficiency of the evidence to sustain mail-fraud. Whether the prosecution will be able to prove the second such element, by showing that the tax returns were false or fraudulent, or by any other appropriate means, remains to be seen; but, I believe this is a matter of proof, not of pleading.

No. 84-5033/5400/5401
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant(84-5033)
Plaintiff-Appellee(84-5400/5401),

v.

JAMES E. GRAY and CHARLES J. McNALLY,
Defendants-Appelees (84-5033),
Defendants-Appellants(84-5400/5401).

BEFORE: JONES and KRUPANSKY, Circuit Judges,
And NEESE, Senior retired District Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgement of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

No. 84-5033, 84-5400/01
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
June 27, 1986
John P. Hehman, Clerk

UNITES STATES OF AMERICA,)
Plaintiff-Appellant)

v.)ORDER

JAMES E. GRAY;)
CHARLES J. McNALLY,)
Defendants-Appellees)

BEFORE: KRUPANSKY and JONES, Circuit Judges; and NEESE, Senior District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NOS. 84-5400/5401

RECEIVED
May 23, 1986
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UNITED STATES OF AMERICA Plaintiff-Appellee

VS.

JAMES E. GRAY
and CHARLES J. McNALLY Defendants-Appellants

Appeal from the United States
District Court for the Eastern
District of Kentucky, No. 83-10

PETITION FOR REHEARING
and
SUGGESTION FOR REHEARING EN BANC
for
DEFENDANT—APPELLAND JAMES E. GRAY

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COUNSEL FOR DEFENDANT—APPELLANT
JAMES E. GRAY

REQUIRED STATEMENT FOR REHEARING EN BANC

Comes the Defendant-Appellant, James E. Gray, by counsel, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 14 of the Rules of the United States Court of Appeals for the Sixth Circuit, and respectfully petitions the Court to grant a rehearing of his appeal herein and suggests that his appeal be reheard en banc.

The undersigned expresses a belief, based on a reasoned and studied professional judgment, that this appeal involves at least one or more questions of exceptional importance:

1. Whether the Sixth Circuit should join the Second Circuit's holding in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert denied*, 461 U.S. 913, 103 S.Ct. 1891 (1983), that the chairman of a political party, who holds no position in Government, owes a fiduciary duty to the citizens of the state because he exercises influence over some decisions of some state officials.

2. Whether the Court should consider the sufficiency of the evidence on both theories submitted to the jury, when the verdict is a general one and it cannot be known which theory the jury based its decision on.

3. Whether this Court should base its affirmance on the concealment of facts by a fiduciary, when in fact the trial court did not submit that issue to the jury and, in effect, entered a judgment, of acquittal on that portion of the offense charged.

/s/ James A. Shuffett
JAMES A. SHUFFETT
ATTORNEY OF RECORD FOR
DEFENDANT—APPELLANT,
JAMES E. GRAY

INTRODUCTION

Defendant-Appellants, James E. Gray and Charles J. McNally, were convicted of one count of conspiring to devise a scheme to defraud in violation of Title 18, U.S.C., Sections 2 and 1341, on March 6, 1984. after a six-week trial.

Oral arguments on this appeal were held on July 30, 1985, and the defendants' convictions were affirmed in a per curiam opinion filed on May 12, 1986. A copy of that Opinion is attached to this Petition as an addendum hereto.

REASONS FOR GRANTING A REHEARING

Mr. Gray urges the Court to grant a rehearing on all issues in this appeal. This Petition, however is limited to the following points of law and fact which the petitioner believes the Court has overlooked or misapprehended:

1. The Opinion is incorrect at page 3 (par. 1), page 4 (par. 2), and page 8 (par. 3) when it states that "McGuffey would execute Hunt's decision" (referring to awarding the workmen's compensation policy to Wombwell), "While Secretary of Public Protection and Regulation, Gray had supervisory authority over McGuffey,"and that awarding of workmen's compensation insurance policy was within Gray's supervisory authority."

2. The Opinion is incorrect at page 3 (par. 4) when it states that "the government's evidence developed that Hunt and Gray were, in fact, the primary parties that controlled Secton and that McNally did not become associated with Seton until late 1977 or 1978."

3. The Opinion is incorrect at page 4 (par. 1)

when it states that the "payments received by Seton from Wombwell were used to purchase a condominium in Lexington, Kentucky, another condominium in Juno Beach, Florida."

4. The Opinion is incorrect at page 4 (par. 1) when it states that the "condominiums and the station wagon were exclusively at the disposal of Gray and Hunt."

5. The Opinion is incorrect at page 8 (par. 3) when it states that "Gray failed to disclose his ownership interest in Seton."

6. The Opinion is incorrect at page 10 (par. 1) when it refers to "Hunt's exclusive domination over the government operation."

7. The Opinion is incorrect at page 10 (par. 1) when it states that "Hunt failed to disclose his ownership interest in Seton."

8. The Opinion failed to note that the testimony was undisputed that James E. Gray did not receive one penny of the insurance commissions distributed by Wombwell to Seton or anyone else.

9. The Opinion failed to note that the testimony was undisputed that James E. Gray resigned as an officer and director of Seton prior to Seton receiving any distribution of the insurance commissions.

10. The Opinion is incorrect throughout (and particularly at page 8, par. 1) where it relies on the concealment of facts by a fiduciary (in violation of the citizens' right to know relevent facts) as a basis for affirming, when in fact the trial court did not submit that issue to the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged.

11. The Opinion is incorrect at page 10, footnote 2, where it holds that it is not necessary to consider defendants' contention that the evidence was insufficient to support a conviction based on the tax objectives, since the verdict was a general

one and it cannot be known which theory the jury based its decision on.

Reasons 1 through 7 above deal with affirmative misstatements of the facts, reasons 8 and 9 deal with material undisputed facts which were not included in the Opinion, and reasons 10 and 11 deal with issues of law or issues of law and fact which it appears the Court overlooked.

Gray also urges the Court to grant his Petition for Rehearing for all the reasons set forth in the Petition for Rehearing of the defendant Charles J. McNally.

ARGUMENT

1. *The Opinion is incorrect at page 3 (par. 1), page 4 (par. 2), and page 8 (par. 3) when it states that "McGuffey would execute Hunt's decision" (referring to awarding the workmen's compensation policy to Wombwell), "While Secretary of Public Protection and Regulation, Gray had supervisory authority over McGuffey," and that "awarding of workmen's compensation insurance policy was within Gray's supervisory authority."*

Even the government, at page 8 of its brief herein, concedes that Hunt only "suggested" to which agents insurance contracts would go, and that the *Personnel Department*, over which Gray had absolutely no authority, had responsibility for workmen's compensation. In other words, the purchase of workmen's compensation was not done by the Department of Insurance, of which McGuffey was Commissioner.

Likewise, the statutory duties of Secretary Gray are set forth in *Ky. Rev. Stat.* 12.270, which provides as follows:

> 12.270. Cabinet Secretaries - Authority, powers and duties. - (1) The secretary of each cabinet shall:

(a) Be a member of the Governor's Cabinet and shall serve as the *Governor's liasion* in carrying out the responsibilities for *overall direction and coordination* of the departments, boards and commissions included in the related Cabinet; (emphasis added)

Supervisory authority over the Department of Insurance actually lies with the Insurance Commissioner pursuant to *Ky. Rev. Stat.* 304.2-100. Gray thus had no authority over McGuffey, and Gray had no authority over the Department of Personnel.

2. *The Opinion is incorrect at page 3 (par. 4) when it states that "the government's evidence developed that Hunt and Gray were, in fact, the primary parties that controlled Seton and that McNally did not become associated with Seton until late 1977 or 1978."*

This was not the evidence. This was merely the prosecutor's unproven claim.

A page 44 of the government's brief, one encounters the bald assertion that McNally was a mere "front man" and did not become involved in Seton until late 1977 and early 1978. In support thereof, the government argues that "Two documents that indicate otherwise, that he was 100% shareholder and an officer dating back to 1975, were signed by McNally with ink that was not commercially available until August, 1978." This statement is incorrect. The government admits, at page 17 of its brief, that the stock certificate signed by McNally which reflects that he had 100% ownership interest in Seton, was in fact signed with ink which was commercially available at the time the document was dated in 1975.

3. *The Opinion is incorrect at page 4 (Par.1) when it states that the "payments received by Seton from Wombwell were used to purchase a condominium in Lexington, Kentucky, another condominium in Juno Beach, Florida."*

This statement is absolutely incorrect. The evidence presented by the government showed conclusively that the Lexington condominium was purchased in September, 1975 with cash contributed to the corporation and a loan from one L. D. Gorman, while Seton did not even receive its first insurance check until March, 1976. (Tr. XXIII, 23-45 through 47).

4. *The Opinion is incorrect at page 4 (par. 1) when it states that the "condominiums and the station wagon were exclusively at the disposal of Gray and Hunt."*

There was no evidence that Gray had ever even seen the station wagon, and he had been to the Juno Beach condominium only twice, and on one of those occasions paid rent to McNally to use it. (Tr. XXIII, 22-112).

5. *The Opinion is incorrect at page 8 (par. 3) when it states that "Gray failed to disclose his ownership interest in Seton."*

The plain fact that there was *no proof* of Gray having any *ownership* interest in Seton. There was nothing to disclose.

6. *The Opinion is incorrect at page 10 (par. 1) when it refers to "Hunt's exclusive domination over the government operation."*

There was no proof that Hunt had any contract with the Personnel Department, which purchased the insurance. Hunt "suggested" to McGuffey, and McGuffey recommended same to the Department of Personnel.

7. *The Opinion is incorrect at page 10 (par. 1) when it states that "Hunt failed to disclose his ownership interest in Seton."*

Again, the plain fact is that there was *no proof* of Hunt having any *ownership* interest in Seton. There was nothing to disclose.

8. *The Opinion failed to note that the testimony was undisputed that James E. Gray did not receive one penny of the insurance commissions distributed by Wombwell to Seton or anyone else.*

At pages 7 (last paragraph) and 8 (first paragraph), the Opinion relates some of the rationalization for the expansion of the mail fraud statuate through the "intangible rights" theory, and in both places it refers to "misuse of public office for personal profit" and "generate personal gains at the expense of the public." The undisputed fact that Mr. Gray did not receive one penny from the insurance commissions should logically be a very material fact. This fact should be included in the Opinion.

9. *The Opinion failed to note that the testimony was undisputed that James E. Gray resigned as an officer and director of Seton prior to Seton receiving any distribution of the insurance commissions.*

Again, this is a substantial material fact which should be included in the Opinion. Not only did Mr. Gray not have any ownership interest in Seton, he resigned as an officer and director upon accepting a position in state government. (Tr. 1/25/84, Vol. I, p. 1-43, 96; Tr. 2/7/84, Vol. III, p. 3-159).

10. *The Opinion is incorrect throughout (and particularly at page 8, par. 1) where it relies on the concealment of facts by a fiduciary (in violation of the citizens' rights to know relevant facts) as a basis for affirming, when in fact the trial court did not submit that issue to the jury and, in effect, entered a judgment of acquittal on that portion of the offense charged.*

Throughout the Opinion (and particularly at page 8, par. 1) there are references to concealment of material facts by a fiduciary and concealment of "ownership" interests by Gray and Hunt. The Panel of this Court logically assumed that the jury was instructed, as usual, by incorporating the charge as made in the indictment. At pages 4 and 5, the Opinion quotes the charge in Count 1, which included:

> a. To devise and intend to devise a scheme and artifice to:
>
> (1) . . .; and (2) defraud the citizens of the Commonwealth of Kentucky, and its governmental departments, . . . of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when selecting an insurance agent to write the Commonwealth of Kentucky's Workmen's Compensation Insurance Policy; . . .

In fact, all of the foregoing was removed when the trial court instructed the jury. *See, Partial Transcript of Trial, March 5 & 6. 1984 at page 25:*

> MR JOHNSON: Your Honor, in this situation we have an indictment that has been cut up in such a fashion that it would be highly prejudicial.
>
> THE COURT: Well, there's no problem about count 1, is there?
>
> MR. SHUFFETT: Your honor, yes there is. You took out the second head --
>
> THE COURT: That's true.
>
> MR. JARRETT: I didn't follow that, Judge. Could you repeat that?
>
> MR. SHUFFETT: There were three parts to the head; part B was omitted --
>
> THE COURT: I took out that part about the right to be made aware of all relevant

and material factors. That's right.

Also, see, Instructions & Verdict, Vol. XXIII, pages 27-15 and 27-16, Instruction No. 11 (relating to Count 1), and page 27-24, Instruction No. 15 (relating to Count 4).

Thus, counsel submits that with regard to the "citizens' right to know facts" (and corresponding concealment by a fiduciary) portion of the ntangible rights theory, the trial court's action constituted the entry of a Judgment of Acquittal as to that portion. It therefore follows that this Court should not base an affirmance upon such premises.

Squarely in point is *United States v. Giampa*, 758 F.2d 928, 932 (3d Cir. 1985) where the Court held:

> . . . The Supreme Court warned that "we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. . . .Rather we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571, 97 S.Ct. at 1355 [quoting from *United States v. Martin Linen Supply*, 430 U.S. 564, 97 S.Ct. 1349 (1977)].

Likewise, this Court, in addition to the *Martin Linen* case, should review *Sanabria v. United States*, 437 U.S. 54, 57 L.Ed. 2d 43 (1978) where the Supreme Court holds that the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States bars even a direct governmental appeal of such matters. Counsel submits that it is, therefore, incorrect to base an appellate decision on matters as to which a judgment of acquittal has, in effect, been entered.

11. *The Opinion is incorrect at page 10, footnote 2, where it holds that it is not necessary to consider defendants' contention that the evidence was insufficient to support a conviction based on the tax objectives, since the verdict was a general one and it cannot be known which theory the jury based its decision on.*

Footnote 2 (page 10) of the Opinion provides:

> 'The indictment in the case at bar charged a conspiracy encompassing two objects: (1) a scheme to deprive the citizenry of Kentucky of certain intangible rights, and (2) a scheme to impair the federal government in the assessment of taxes. Because the government had demonstrated beyond a reasonable doubt that the defendants engaged in a conspiracy with the purpose of depriving the citizens of their intangible rights, it is not now necessary to consider defendants' contention that the evidence was insuficient to support a conviction based on the tax objectives alleged in the indictment.

The trial court instructed the jury that a conviction could be based upon either of the objectives (Instruction 12, Tr. Vol. XXVII, pages 27-18 and 27-19), and the verdict was a general one (Tr. Vol. XXVII, page 27-36).

At this point in time, we have no way to know whether the jury agreed upon the intangible rights objective, the tax objective, or both. In the event the jury agreed on the tax objective but not the intangible rights objective, the defendants herein would certainly have a right to have the sufficiency of that evidence reviewed by this Court.

United States v. Tarnopol, 561 F.2d 466, 473-475 (3d Cir. 1977) is directly in point on this issue, where the Court, at 475, held:

> It follows that there was a failure of proof with respect to this particular alleged objective of the conspiracy. Accordingly, since we cannot know whether or not the jury based

its verdict upon this objective alone, the verdict of guilty on Count 1 cannot stand. *United States v. Dansker*, 537 F.2d 40, 51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) . . .

Thus, at the very least, this issue should be examined by this Court and made a part of the Opinion. (The tax question is covered by Argument V of Gray's original brief, Argument II of the U. S. brief, and Argument V of Gray's reply brief.)

CONCLUSION

The Court should grant this Petition for Rehearing in the eleven particulars stated herein, and with those changes, the Court should re-examine its conclusion to affirm and should reverse this action.

RESPECTFULLY SUBMITTED,

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JAMES E. GRAY

CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc for Defendant-Appelant Gray were mailed by first-class mail, postage prepaid, to Hon. Louis DeFalaise, United States Attorney, Federal Building, Lexington, Kentucky 40507; Hon. Frank E. Haddad, Jr., 529 Kentucky Home Life building, Louisville, Kentucky 40202, Counsel for Charles J. McNally; and Hon. H. Marshall Jarrett, Assistnat Chief, United States Department of Justice, Public Integrity Section, P.O. Box 50168, F Street Station, Washington, D.C. 20004-0168, all on this the 22nd day of May, 1986.

COUNSEL FOR DEFENDANT—APPELLANT
JAMES E. GRAY

OPPOSITION

BRIEF

Nos. 86-234 and 86-286

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES J. McNALLY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES E. GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1918

QUESTIONS PRESENTED

1. Whether petitioners, who participated in a kickback scheme involving a public official and a political party leader found to be a de facto public official, were properly convicted of violating the rights of the citizens of Kentucky to have the State's business conducted honestly.

2. Whether petitioner Gray's conviction was affirmed on a theory that was not submitted to the jury.

3. Whether the evidence that petitioner Gray conspired to attain at least one objective of a dual-objective conspiracy warranted affirmance of his conviction.

4. Whether the evidence was sufficient to support petitioner McNally's conviction.

5. Whether the indictment was defective because it alleged multiple means of committing an offense.

6. Whether the government's proof at trial constructively amended the indictment.

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 790 F.2d 1290.[1]

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[1]Pet. App. refers to the appendix to the petition in No. 86-286, unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1986, and a petition for rehearing was denied on June 27, 1986 (Pet. App. 20a). The petition for a writ of certiorari in No. 86-234 was filed on August 13, 1986, and the petition for a writ of certiorari in No. 86-286 was filed on August 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners Gray and McNally were each convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and on one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371.[2] Petitioners were sentenced under 18 U.S.C. 4205(c) for a study prescribed in Section 4205(d). The Section 4205(d) studies were postponed pending appeal, and both defendants were released on bond.

The evidence adduced at trial is recounted in the opinion of the court of appeals (Pet. App. 2a-4a). Briefly, it showed that petitioners Gray and McNally, along with Howard P. Hunt, who pleaded guilty to mail fraud and testified at trial (Pet. App. 2a n.1), conspired to obtain and distribute kickbacks on commissions paid by the State of Kentucky for workmen's compensation insurance. In 1974, Democrat Julian Carroll became Governor of Kentucky, and soon thereafter Hunt was selected as the Kentucky Democratic Party Chairman. Hunt advised the Wombwell Insurance Agency (Wombwell) that the State would continue to purchase workmen's compensation insurance through that

[2]The district court dismissed six of the seven substantive mail fraud counts. The government's challenge to that dismissal was rejected by the court of appeals (Pet. App. 14a-15a), with one judge dissenting (*id.* at 16a-18a).

agency if Wombwell would agree to channel State-paid commissions exceeding $50,000 per year to insurance agencies specified by Hunt. Wombwell agreed to that arrangement, which it had maintained with other political leaders during the preceding administration. Pet. App. 2a-3a.

In January 1976, the Governor appointed petitioner Gray to the position of Secretary of Public Protection and Regulation, which gave him supervisory authority over the State's insurance commissioner, Harold McGuffey.[3] Beginning in July 1975 and continuing throughout the Carroll administration, Hunt directed McGuffey to award the State's workmen's compensation policy to Wombwell. During that period, Wombwell channeled a total of $851,000 in commissions from the State to 21 agencies designated by Hunt, including Seton Investments, Inc. Seton was a corporate shell controlled by Hunt and petitioner Gray; they received kickbacks totalling $200,000 through that entity. Hunt and Gray used that money to purchase two condominiums and an automobile, and to make payoffs to petitioner McNally, who received $77,500 for serving as the "front man" in Seton (Pet. App. 3a-4a).

ARGUMENT

1. Petitioners argue (86-234 Pet. 18-20; 86-286 Pet. 8-11) that they were improperly convicted of "intangible rights" mail fraud. Petitioners were charged with conspiring to deny the citizens their right to have the State's business conducted honestly and free from corruption (Pet. App. 6a-7a). To prove a scheme to defraud citizens of such intangible rights, as the court of appeals held, it is necessary to show that one member of the conspiracy is a "public fiduciary" (*id.* at 8a). Petitioners contend that no public

[3]Gray also was secretary of the Governor's cabinet from January 1977 until August 1978 (Pet. App. 4a).

fiduciary was involved in their scheme because co-conspirator Hunt was merely a Democratic Party official. That argument ignores the fact that petitioners' criminal liability was predicated "on both *Gray's* actual fiduciary status as an appointed public official who actively participated in the conspiracy and Hunt's fiduciary status as a de facto public official" (Pet. App. 9a (emphasis added)). The evidence showed that both Gray and Hunt violated fiduciary duties they owed to the citizens of Kentucky. Contrary to petitioner Gray's claim (86-286 Pet. 5), the court of appeals found that "the awarding of workmen's compensation insurance polic[ies] was within Gray's supervisory authority" (Pet. App. 9a). The court also correctly rejected (*id.* at 9a-11a) the argument that Hunt had no fiduciary duty to the public. As the court explained (*id.* at 10a-11a): "Hunt * * * exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to Wombwell and the payment of monetary kickbacks to Seton. * * * Hunt's exclusive domination over the government operation * * * placed him into the position of a de facto public official who assumed a fiduciary duty to the citizens of Kentucky." The court's decision in that respect is indistinguishable from the decision in *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983), and does not conflict with the decision of any other court of appeals.[4]

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[4]There is no merit to petitioner Gray's argument (86-286 Pet. 10-11) that application of the intangible rights doctrine to political party officials "poses significant First Amendment problems." He does not claim that it violated the First Amendment to base the prosecution on Hunt's participation in the corrupt arrangement to exact and receive kickbacks. Rather, Gray argues that the instant case portends prosecutions of party officials for merely engaging in disfavored "political activities." To borrow from a portion of the opinion in *Margiotta* rejecting the identical argument (688 F.2d at 129): "The First Amendment concerns raised by [petitioners] * * * are a chimera. [The mail fraud charges] do not address mere participation in the political process or protected conduct such as lobbying or party association. Rather than resting on a generalized breach of duty to render disinterested services on the part of one who participates in the political process in some unspecified way, the indictment and prosecution focused [in part on whether Hunt's corrupt arrangement] breached a fiduciary duty which [he] owed as a result of his significant role in [State affairs]."

2. Petitioner Gray contends (86-286 Pet. 12-14) that the district court "in effect, entered a judgment of acquittal" (*id.* at 12) on the charge in the indictment that he conspired to conceal his involvement in the scheme from the citizens of Kentucky. Therefore, he argues, the court of appeals erred by partially relying upon the concealment of his ownership interest in Seton in upholding his conviction. This claim is baseless.

Before the case was submitted to the jury, the district court ruled that the charge in the indictment that petitioners conspired to " 'defraud the citizens of the Commonwealth of Kentucky, and its governmental departments, agencies, officials and employees, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when selecting an insurance agent to write the Commonwealth of Kentucky's Workmen's Compensation Insurance Policy' " (Pet. App. 5a) was, in effect, subsumed in the other aspects of the scheme. Accordingly, the court's instructions to the jury on the alleged scheme omitted any express reference to the portion of the indictment quoted above. The court, however, instructed the jury that the charged fraud encompassed the allegations that Gray and Hunt set up Seton "for the purpose of concealing and disguising [their] receipt" of the commission kickbacks (C.A. App. 1335); that Gray "failed to disclose [his] interest [in Seton] to persons in State Government whose actions or deliberations could have been affected by such disclosure" (*id.* at 1344); and that Hunt failed to disclose his arrangement with Wombwell to receive the kickbacks (*id.* at 1335).

Those instructions plainly refute the claim that the district court acquitted petitioner Gray of the concealment aspect of the fraud and that the concealment theory was not submitted to the jury.

3. The indictment alleged that the conspiracy encompassed two objectives: (1) depriving the public of its right to honest and impartial government and (2) avoiding personal income taxes on the kickbacks. The court of appeals ruled (Pet. App. 11a n.2) that because the proof was sufficient to show that petitioners engaged in a conspiracy to accomplish the first objective, it was unnecessary to consider the contention that "the evidence was insufficient to support a conviction based on the [alleged] tax objectives." Contrary to petitioner Gray's claim (86-286 Pet. 15-20), the court of appeals' ruling in this regard was correct.

"[I]t is well-settled that when 'a conspiracy had multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that [the defendant] agreed to accomplish at least one of the criminal objectives.' " *United States* v. *DeLillo*, 620 F.2d 939, 948 (2d Cir.), cert. denied, 449 U.S. 835 (1980) (quoting *United States* v. *Papadakis*, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975)). See also *United States* v. *Merida*, 765 F.2d 1205, 1222 (5th Cir. 1985); *United States* v. *Lemire*, 720 F.2d 1327, 1345 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Solomon*, 686 F.2d 863, 875 (11th Cir. 1982); *United States* v. *Murray*, 621 F.2d 1163, 1171 (1st Cir.), cert. denied, 449 U.S. 837 (1980); *United States* v. *Wedelstedt*, 589 F.2d 339, 340 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *Mackey*, 571 F.2d 376, 387 n.14 (7th Cir. 1978); *Moss* v. *United States*, 132 F.2d 875 (6th Cir. 1943). That principle is consistent with the decisions of this Court. See, *e.g.*, *Turner* v. *United States*, 396 U.S. 398, 420 (1970) (footnote omitted) ("[t]he general rule is that

when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged"); *Crain* v. *United States*, 162 U.S. 625, 634-636 (1896).[5]

In any event, the evidence, viewed in the light most favorable to the government, was sufficient on the tax objective as well. It established that Seton was a corporate shell—it had no office, telephone, or employees and engaged in no business activity. As the evidence showed, Seton was created by petitioner Gray and co-conspirator Hunt for the purpose of receiving kickbacks, concealing their interest in the property purchased with the kickbacks, and avoiding personal income taxes on the kickbacks (17 Tr. 141; 18 Tr. 51-60). By falsely reporting the kickbacks as income to Seton, the conspirators avoided paying federal taxes on the kickbacks at their substantially higher personal tax rates (18 Tr. 60). In addition, the conspirators claimed a fraudulent business

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[5]The rule is different where one of the several objectives suffers from a legal flaw and therefore fails to state an offense. See *United States* v. *Griffin*, 699 F.2d 1102, 1107 n.9 (11th Cir. 1983); *United States* v. *Irwin*, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Head*, 641 F.2d 174, 179 (4th Cir. 1981); *Van Liew* v. *United States*, 321 F.2d 674 (5th Cir. 1963). In a case such as this one, however, where the defendants' claim is simply one of evidentiary insufficiency, it is not necessary for the reviewing court to assess the evidence supporting each of the alleged objectives. In that setting, a reviewing court's task is simply to determine whether there was sufficient evidence to permit a rational jury to find the defendants guilty beyond a reasonable doubt. It is not a reviewing court's task to hypothesize about the route that the jury may have followed in reaching its verdict. As the Court noted in *Jackson* v. *Virginia*, 443 U.S. 307, 319-320 n.13 (1979), the question whether the evidence is sufficient to support a conviction is "wholly unrelated to the question of how rationally the verdict was actually reached." See also *Harris* v. *Rivera*, 454 U.S. 339, 348 & n.20 (1981) (as long as the trial was conducted fairly and the record contains adequate evidence of guilt, it is immaterial how the fact-finder went about reaching its verdict).

deduction on Seton's return for a $38,500 payment to co-conspirator Hunt's son (*id.* at 58). This evidence amply established the tax objective of the conspiracy. See *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957); *United States* v. *Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), cert. denied, 439 U.S. 953 (1978).

Petitioner Gray contends (86-286 Pet. 19) that the decision in this case conflicts with the Third Circuit's decision in *United States* v. *Tarnopol*, 561 F.2d 466, 473-475 (1977). In that case, the court held that a conviction for conspiracy that encompassed three objectives could not be sustained because there was insufficient evidence with respect to one of the objectives. The ruling in *Tarnopol* is inconsistent with this Court's decision in *Turner* and the decisions of the other courts of appeals cited above. In any event, *Tarnopol* would not apply to the facts of this case for two reasons. First, as we have noted, the evidence in this case was sufficient to support both conspiratorial objectives. Second, the fact that the jury convicted petitioners on the substantive mail fraud count makes it almost inescapable that the jury based its verdict at least in part on the mail fraud objective of the conspiracy. Thus, because of the convictions on the substantive count, there is no realistic possibility that the jury could have based its verdict on the conspiracy count entirely on the tax objective; for that reason, even if *Tarnopol* stated the correct rule as a general matter, it would not require the court of appeals to review the sufficiency of the evidence supporting the tax objective in this case. See *United States* v. *Pepe*, 747 F.2d 632, 667 (11th Cir. 1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983); *United States* v. *Wedelstedt*, 589 F.2d at 342; *United States* v. *Dixon*, 536 F.2d 1388, 1401-1402 (2d Cir. 1976).[6]

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[6]The decisions in *United States* v. *Berardi*, 675 F.2d 894, 902 (7th Cir. 1982), and *United States* v. *Talkington*, 589 F.2d 415, 417 (9th Cir. 1978), do not support petitioner's argument. Those cases did not involve conspiracy charges at all; rather, they involved substantive counts in which several offenses were charged in the same count. In that setting, the courts held that if the jury was given a "one is enough" charge, the reviewing court was required to review the sufficiency of each of the offenses charged in the duplicitous count. The same principle does not apply when the count in question charges only a single conspiracy, as in this case.

4. Petitioner McNally's contention (86-234 Pet. 9-12) that the evidence was insufficient to sustain his convictions is without merit. With respect to the conspiracy count, he argues (*id.* at 9) that he was one of a number of insurance agents who shared in the commissions paid by the State for its workmen's compensation policy even though they "performed [no] services" in connection with the policy, and that this "commission sharing" constituted "legitimate political patronage." Petitioner also argues (*id.* at 11) that he was convicted merely because "he was associated with [co-conspirators] Gray and Hunt." These arguments are refuted by the evidence that the kickback scheme involved, inter alia, concealment of the conflict of interest of Gray and Hunt; the receipt of $851,000 in excess "commissions" by individuals (including both petitioners) who McNally admits performed no services entitling them to the money; and McNally's central role in the use of Seton as a conduit for the kickbacks.

Petitioner McNally's claim (86-234 Pet. 12-13) that his conviction on the substantive mail fraud count was improper on the ground that the underlying mailing was not in furtherance of the kickback scheme is insubstantial. The mailing at issue was an excess commissions check sent from the State's insurer to Wombwell—the principal conduit for commission kickbacks. Accordingly, the mailing related to the receipt and distribution among the co-conspirators of the fruits of the scheme. As such, it plainly supported the mail fraud conviction. See *United States* v. *Lea*, 618 F.2d

426, 430-431 (7th Cir.), cert. denied, 449 U.S. 823 (1980) (mailing of commission check to conduit for kickbacks supported mail fraud conviction).

5. Petitioner McNally next contends (86-234 Pet. 13-15) that he was denied his right to be informed of the nature of the charges against him, because the indictment alleged "multiple theories" of fraud. This Court's decision in *United States* v. *Miller*, 471 U.S. 130 (1985), affirmed the principle that charging multiple theories of an offense in an indictment does not contravene the rules of pleading. In fact, Fed. R. Crim. P. 7(c), which petitioner claims was violated in this case, expressly permits alleging in a single count multiple means of committing an offense. Nor was the indictment deficient in any other respect. As the court of appeals explained (Pet. App. 12a-13a):

> The indictment in the case at bar presented the defendants with more than adequate notice of the offenses charged. The conspiracy count identified the principal co-conspirators, described their official positions, and specified both the detailed operations and objectives of the conspiracy. The mail fraud count disclosed similar factual details. In addition, a bill of particulars, provided at defendants' request, identified Hunt, Gray, and McGuffey as the potential fiduciaries alluded to in the indictment, explained the use of the term "excess commissions", provided defendants with a list of government witnesses, and disclosed other details about the case.

6. Petitioner McNally also argues (86-234 Pet. 15-18) that the government's proof at trial that Gray and Hunt actually controlled Seton contradicted the allegation in the indictment, as well as a government stipulation, that McNally was Seton's sole recorded stockholder from its inception, and thus constructively "amended the indictment

as to the 'central issue' of the trial" (*id.* at 18). The court of appeals correctly rejected this contention (Pet. App. 13a-14a). First, both the indictment and the stipulation asserted that petitioner was the "sole *recorded* stockholder" of Seton (86-234 Pet. App. 19a (emphasis added)), not that he was the true owner of the company. The indictment also contained numerous allegations indicating that Gray and Hunt actually controlled Seton and that McNally was their "front man" (*id.* at 28a-36a). In any event, the central theory of the scheme to defraud alleged in the indictment and proved at trial was the solicitation of unearned and excess insurance commission kickbacks by the conspirators. Although the evidence that McNally served as Seton's "front man" tied him to the concealment aspect of the scheme, his precise status was hardly essential to the government's case. Petitioner McNally does not question the evidence that co-conspirators Gray and Hunt received $200,000 in excess commissions through Seton and that they in turn passed on $77,500 of that money to him. He also does not dispute the evidence that he did nothing to entitle him to a commission, and that he arranged to collect his share of the kickback through an intermediary. That evidence was sufficient to establish McNally's complicity in the alleged scheme—including its concealment aspect—regardless of whether he actually owned Seton.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

DOJ-1986-11

PETITIONER'S

BRIEF

Nos. 86-234, 86-286

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES J. McNALLY,
JAMES E. GRAY - - - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR PETITIONER McNALLY IN No. 86-234

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QUESTION PRESENTED

Whether the mail fraud statute was improperly expanded to include a person who holds no position in government on an "intangible rights" theory that he owes a fiduciary duty to the citizens of the state because he exercises influence over some decisions of a state official.

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BRIEF FOR PETITIONER McNALLY IN No. 86-234

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 790 F. 2d 1290 (1986). The petition for rehearing en banc was denied June 27, 1986.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit was decided and filed on May 12, 1986 (Petition No. 234, Appendix 1a-17a); and a timely petition for rehearing was denied by order of the Court of Appeals for the Sixth Circuit on June 27, 1986 (Pet. App. 18a). The Petition for a Writ of Certiorari was filed on August 13, 1986. The Petition was granted on De-

cember 8, 1986, and the case was consolidated with *Gray* v. *United States,* No. 86-286. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

An extension of time to file petitioners' briefs on the merits was granted on January 12, 1987, and the time was extended to and including February 2, 1987.

STATUTES INVOLVED

Section 1341 of Title 18, United States Code, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Petitioner McNally and co-defendant Gray were convicted after a jury trial in the Eastern District of Kentucky of "knowingly and willfully conspiring to devise a scheme and artifice to defraud, in violation of Title 18, Section 371 U.S.C., and using and aiding and abetting in using mails in a scheme and artifice to defraud, in violation of Title 18, Sections 1341 and 2 U.S.C."

The petitioner and co-defendant were charged in a 39-page indictment with one conspiracy violation and seven mail fraud violations. Count One, a conspiracy count extending through 26 pages, charged that petitioner McNally and co-defendant Gray conspired "with Howard P. 'Sonny' Hunt, Jr., and others" to commit multiple criminal objectives, paraphrased as follows:

a) To agree to scheme and utilize the mails for the purpose of executing said scheme, to:
   1) defraud the citizens of Kentucky of their right to have the Commonwealth's business conducted honestly;
   2) defraud the citizens of Kentucky of their right to be made aware of all relevant facts when:
      A) Selecting an agent to write the Commonwealth's Workmen's Compensation Insurance Policy; and when
      B) committing the Commonwealth's funds to pay for said insurance;

3) obtain money and other things of value by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

b) To agree to defraud the United States by impeding, impairing, obstructing and defeating the functions of the Internal Revenue Service in the ascertainment, computation, assessment, and collection of federal taxes.

At the instructions conference, the court determined not to instruct the jury as to (a)(2) above. [Partial Transcript of Trial, March 5 & 6, 1984: p. 25.]

Counts, Two, Three, Five, Six, Seven and Eight charged the petitioner and co-defendant with mail fraud in the mailing of various tax returns. These counts were dismissed by the trial court prior to trial. [Order, December 16, 1983: Docket Entry, 65.] The court of appeals affirmed the trial court's dismissal of these counts. *United States* v. *Gray,* 790 F. 2d 1290, 1298 (6th Cir. 1986).

Count Four, a mail fraud count incorporating "All of the allegations in Part A [Introduction] of Count One and Part B and C of Count Two of this Indictment," charged that petitioner McNally and co-defendant Gray, "together with Howard P. 'Sonny' Hunt, Jr. and others" aided and abetted each other and devised a scheme, paraphrased as follows:

a) To defraud the citizens of Kentucky of their right to have the Commonwealth's business conducted honestly;

b) To defraud the citizens of Kentucky of their right to be made aware of all relevant facts when:

1) selecting an agent to write the Commonwealth's Workmen's Compensation Insurance policy; and when

2) committing the Commonwealth's funds to pay for said insurance;

c) To obtain money and other things of value by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts;

and for the purpose of executing said scheme, caused the mailing of an envelope addressed to Wombwell Insurance Agency in Lexington, Kentucky, "containing a commission check, number 1089512 in the amount of $58,685.00 from The Hartford, representing commissions on the Commonwealth of Kentucky's Workmen's Compensation Insurance Policy," on May 8, 1979. Count Four did not allege a scheme to impair the I.R.S. function to collect taxes.

The principals involved were: Defendant James E. Gray, who held the cabinet position of Secretary for Public Protection and Regulation, and was later Secretary of the Cabinet under Governor Julian Carroll in Kentucky. [Transcript of Evidence, hereinafter referred to as T.E., Volume XXI: 83, 98.] Charles J. McNally, petitioner herein, was a businessman from Prestonsburg, Kentucky, who had devoted considerable time, money and effort to achieve the election of Governor Carroll. [T.E. XXIII: 32-33,

101-102.] Howard P. "Sonny" Hunt, Jr., was Chairman of the Kentucky Democratic Party during the administration of Governor Carroll. [T.E. I: 3-4.]

Since 1971, Kentucky had purchased workmen's compensation insurance through the Wombwell Insurance Agency of Lexington, Kentucky. The policy was awarded to Wombwell after its vice-president Robert Tabeling, agreed with certain then political leaders to pay a percentage of the commissions resulting from the policy to other insurance agents as designated by those political leaders.

In 1974, Julian M. Carroll became Governor of Kentucky. Shortly thereafter, Howard P. Hunt was selected as Chairman of the Democratic Central Executive Committee of the Democratic Party. [T.E. I: 3-4.] To insure awarding the Kentucky workmen's compensation insurance policy to Wombwell, Tabeling conferred with Hunt on several occasions during the spring of 1975 to discuss the subject. At one of those meetings, Hunt advised Tabeling and Mr. Wombwell that Wombwell could retain the workmen's compensation insurance policy for the forthcoming year, commencing July 1, 1975, and thereafter, if it would agree to share a percentage of the insurance commissions with other insurance agents. Tabeling and Wombwell agreed to pay all commissions received in excess of $50,000.00 per year to any authorized insurance agencies specified by Hunt. [T.E. VII: 13, 15.] This arrangement was maintained, with minor adjustments, throughout the Carroll administration. [T.E. I: 12-13, 93-94.]

From 1975 to 1979, the award of the workmen's compensation insurance policy was accomplished by the then insurance commissioner, Harold McGuffey, recommending Wombwell to the State personnel department who purchased the insurance. Wombwell then contracted with an insurance underwriting company, The Hardford Insurance Group, to write the policy.

During the Carroll administration, Hunt directed Wombwell to pay twenty-one separate designated insurance agencies the sum of $851,000.00 from the commissions resulting from the workmen's compensation insurance policy commission payments it received for this period. [T.E. I: 102-114.] Of the $851,000.00 in commissions paid by Wombwell to other agencies, nine checks totaling $200,000.00 were issued to Seton Investments, Inc. [T.E. I: 26-28, 35.] In addition, Mr. McNally received $77,500.00 through the Snodgrass Insurance Agency during this period. [T.E. I: 37, 40, 116.]

McNally was "deserving of some of the patronage in the form of sharing" in the commissions with Wombwell. [T.E. I: 103.] He was a licensed agent and lawfully received these commissions, as did numerous other agents across the state who were political supporters of Governor Carroll. [T.E. I: 102-114.] It is uncontested that none of these agents performed any service for the commissions and that none of these other agents was indicted. [T.E. I: 103-104, 111-114.]

The government had originally stipulated that McNally was an officer, director and the sole recorded stockholder of Seton Investments from September, 1975 until December, 1981. [T.E. V: 28-29.] However, during the trial the government changed its position and attempted to prove that Seton Investments, Inc. was controlled by Hunt and Gray. [T.E. XX: 13.] No evidence was ever presented that Gray or Hunt ever owned a single share of stock in Seton Investments, Inc. In addition, no evidence was ever presented that Gray ever received a single penny of the commissions. In fact, the evidence was undisputed that Gray, while having served as an original officer and director of Seton in the fall of 1975, had resigned from the corporation in all respects prior to it ever receiving any insurance commission checks. [T.E. XXI: 91.]

In January of 1976, Governor Carroll appointed Gray as Secretary of Public Protection and Regulation. [T.E. XXI: 83, 93.] As such Secretary, Gray's duties included serving as liaison between the Governor and the Department of Insurance. Actual supervisory authority over the Department of Insurance lay with the insurance commissioner. Gray had no authority whatsoever over the Department of Personnel, which actually purchased the workmen's compensation policies.

Petitioner McNally appealed his conviction of Counts One and Four. The court of appeals affirmed the conviction stating that the indictment gave adequate notice of the offenses charged; that the indictment was not constructively amended; that there was sufficient evidence; and that Hunt did have a fiduciary duty to the citizens of the state even though he held no position in government.

SUMMARY OF ARGUMENT

Petitioner respectfully requests this Court to reverse the decision of the United States Court of Appeals for the Sixth Circuit which held that an individual who has no formal employment relationship with the government may nonetheless substantially participate in government operations so as to assume a fiduciary duty to the general citizenry.

The government contends that because Hunt was Chairman of the Democratic Party and exercised influence over some decisions of a state official, he therefore was a de facto public official and owed a fiduciary duty to the citizens of the Commonwealth of Kentucky. It is petitioner's contention that this is an unwarranted expansion of the federal mail fraud statute on an "intangible rights" theory.

The mail fraud statute has been employed in prosecutions of public officials who have allegedly deprived the citizenry of such intangible rights to good government, or the right to the honest and loyal services of its government officers. *United States* v. *Mandel,* 591 F. 2d 1347, 1358 (4th Cir.), *aff'd en banc in relevant part,* 602 F. 2d 653 (1979), *cert. denied,* 445 U. S. 961 (1980).

The government in this case, however, relied on *United States* v. *Margiotta,* 688 F. 2d 108 (2d Cir. 1982), *cert. denied,* 461 U. S. 913 (1983), which held that a party leader, who held no position in government yet exercised such a stranglehold over government operations as to be a de facto public official, could be found to owe a fiduciary duty to the general citizenry. This holding expanded the use of the mail fraud statute far beyond any previous application.

The *Margiotta* decision recognized two measures of fiduciary status: (1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary.

This Court has never approved the "intangible rights" theory. The mail fraud statute should not now be expanded to include an intangible rights theory because the language of the statute does not support such an expansion, and there is no evidence that Congress intended the mail fraud statute to include intangible rights theories of prosecution. Further, the creation of an intangible rights theory violates the principle prohibiting common law offenses.

In the present case, this theory was expanded even further by including those accused of conspiring with Hunt, the Democratic Party Chairman. Hunt was not a de facto public official and therefore owed no fiduciary duty to the general citizenry. Although

Hunt exercised patronage influence with Insurance Commissioner McGuffey by directing him to award the state workmen's compensation policy to Wombwell, Hunt did not make any governmental decisions nor did others rely upon him for that purpose. Therefore, the "intangible rights" theory in *Margiotta* should be limited to persons who have stepped out of the role of influential party leaders and into the role of de facto public officials actually making governmental decisions.

ARGUMENT

The Mail Fraud Statute Was Improperly Expanded to Include a Person Who Holds No Position in Government on an "Intangible Rights" Theory That He Owes a Duty to the Citizens of the State Because He Exercises Influence Over Some Decisions of a State Official.

There is no statutory authority for prosecution based on an intangible rights theory, under the mail fraud statute. The facial language of 18 U.S.C. § 1341 does not provide for the creation of an intangible rights theory. Further, there is no evidence of any congressional intent to create an intangible rights theory of prosecution under the mail fraud statute. The statutory language of 18 U.S.C. § 1341 was originally drafted in 1972 and was last significantly amended in 1909. The 1909 amendment changed the statute by adding after the original prohibition of "any scheme or artifice to defraud" the word "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. The 1909

amendment was designed only to remove one particular common law defense, codifying a prior Supreme Court decision in *Durland* v. *United States,* 161 U. S. 306 (1896); it clearly did not add an intangible rights basis for prosecution. *See,* the thorough analysis of the 1909 amendment in Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute,* 47 U. Chi. L. Rev. 562, 569-572 (1980). "Once the 1909 amendment is seen as the codification of *Durland,* that amendment is necessarily inconsistent with the intangible-rights theory." *Id.,* p. 572.

> Analysis of the legislative history of section 1341 demonstrates that the section's reach should be limited to fraudulent conduct that results in the acquisition of money or property from the victim. The meaning of fraud in the nineteenth century, when the mail fraud statute was originally adopted, bolsters such a reading.

Id., p. 587. It is clear that the use of Section 1341 under an intangible rights theory was and is contrary to the intention of Congress in its enactment of the present statute.

In view of the fact that neither the language of the statute nor the intention of Congress provides for an intangible rights theory of prosecution under the mail fraud statute, the rule prohibiting such an application applies:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.

United States v. *Bass,* 404 U. S. 336, 347 (1971); *Williams* v. *United States,* 458 U. S. 279, 290 (1982).

> [A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

Rewis v. *United States,* 401 U. S. 808, 812 (1971).

> [B]efore a man can be punished as a criminal . . . his case must be "plainly and unmistakably" within the provisions of some statute.

United States v. *Gradwell,* 243 U. S. 476, 485 (1917). Thus, the mail fraud statute cannot be said to authorize an expansion which includes an intangible rights theory of prosecution.

Prosecution based on an intangible rights theory under the mail fraud statute also violates the principle that 'there are no federal common law crimes.'

> It is well settled that there are no common law offenses against the United States.

United States v. *Eaton,* 144 U. S. 677, 687 (1892). *Accord, United States* v. *Gradwell,* 243 U. S. 476, 485 (1917). Prosecutorial attempts to graft infinite varieties of intangible rights theories onto the present mail fraud statute constitute no more nor less than the forbidden creation of common law offenses.

The United States Supreme Court has *never* approved the expansion of the mail fraud statute to include an intangible rights theory of prosecution. For instance, the only Section 1341 intangible rights po-

litical-corruption case to reach this Court is *Parr* v. *United States,* 363 U. S. 370 (1960). In *Parr,* this Court did not address the validity of the intangible rights doctrine. In other cases, this Court's focus has been limited to "mailing requirement" issues. *See,* discussion in Hurson, *Limiting the Federal Mail Fraud Statute — A Legislative Approach,* 20 Am. Crim. L. Rev. 423, 444 n. 169, 456 n. 269 (1983): "The Supreme Court has never directly considered the intangible-rights doctrine."

Because the facial language of the mail fraud statute does not provide for the creation of an intangible rights theory, because Congress never intended the mail fraud statue to include intangible rights theories of prosecution, because the creation of intangible rights theories of prosecution under the mail fraud statute violates the rule prohibiting common law offenses, and because the United States Supreme Court has never approved the expansion of the mail fraud statute to include intangible rights theories of prosecution, it is respectfully submitted that the mail fraud statute should not now be expanded to include an intangible rights theory.

Although the mail fraud statute should not be expanded to include intangible rights theories at all, a number of circuits have interpreted 18 U.S.C. § 1341 as proscribing schemes to defraud the citizens of a state of their intangible rights to honest and impartial government. The theory underlying these cases is that a public official is a "trustee for the citizens of the

state . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty." *United States* v. *Mandel,* 591 F. 2d 1347, 1363 (4th Cir.), *aff'd en banc in relevant part,* 602 F. 2d 653 (1979), *cert. denied,* 445 U. S. 961 (1980). "The intangible rights theory is anchored upon the defendant's misuse of his public office for personal profit." *United States* v. *Gray,* 790 F. 2d 1290, 1295 (6th Cir. 1986). "This doctrine of the deprivation of honest and faithful service has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage. . . ." *United States* v. *Dixon,* 536 F. 2d 1388, 1400 (2d Cir. 1976). At the same time, misconduct by a public official that occurs in his personal capacity, or which does not involve misuse of his official position, results in no breach of his official fiduciary duty and no violation of the mail fraud statute. *United States* v. *Rabbitt,* 583 F. 2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U. S. 1116 (1979). Further, proof of active fraud, rather than just constructive fraud, is necessary. *Epstein* v. *United States,* 174 F. 2d 754, 766 (6th Cir. 1949).

In *United States* v. *Margiotta,* 688 F. 2d 108 (2d Cir. 1982), *cert. denied,* 461 U. S. 913 (1983), a divided Second Circuit expanded the intangible rights theory of the mail fraud statute and invented a federal fiduciary duty owed to the citizenry by private persons who completely dominate the affairs of government. *Margiotta* is the only case to hold that a political party chairman owes a fiduciary duty to the general

public. The case at bar, by use of the conspiracy statute, expanded the holding in *Margiotta* to include persons accused of conspiring with such a political party chairman.

The government's theory in the present case was that because Hunt was Chairman of the Democratic Party and exercised some influence over some decisions of a state official, he therefore owed a fiduciary duty to the citizens of Kentucky. The trial court relied exclusively on the opinion in *Margiotta* where the court held that, in limited circumstances, a party leader may owe a fiduciary duty to the general citizenry where he exercises a "stranglehold" control over government "as a whole." *Margiotta,* 688 F. 2d at 122.

The Second Circuit in *Margiotta* recognized the danger involved in expanding the statute to reach politically active persons.

> On the one hand, the prosecution under § 1341 of those who simply participate in the affairs of government in an insubstantial way, or exercise influence in the policymaking process, poses the danger of sweeping within the ambit of the mail fraud statute conduct, such as lobbying and party association, which has been deemed central to the functioning of our democratic system since at least the days of Andrew Jackson.

Id., 688 F. 2d at 120. In determining whether a fiduciary duty was owed to the citizens by Margiotta, the Republican Committee Chairman, the court found it

> essential to avoid the Scylla of a rule which permits a finding of fiduciary duty on the basis of mere influence or minimum participation in the processes of government. Such a rule would threaten to criminalize a wide range of conduct, from lobbying to political party activities, as to which the public has no right to disinterested service.

Id., 688 F. 2d at 122.

The court decided on two time-tested measures of fiduciary status: "(1) a reliance test, under which one may be a fiduciary when others rely upon him because of a special relationship in the government, and (2) a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary." *Id.,* 688 F. 2d at 122. The Second Circuit approved the jury instruction that such a fiduciary duty arises when an individual "participates in the conduct of governmental affairs." *Id.,* 688 F. 2d at 123. That concept was further defined.

> A person participates in the affairs of government if he regularly takes part in the conduct of the business of government with knowledge that his participation is relied on by others in government in order to carry forward the business of governing as a whole and with the intention of conducting and carrying forward affairs of the government in which he participates. . . . In order for you to make a predetermination that the defendant participated in government, you must find that the work done by him was in substantial part the business of government rather

> than being solely party business [and] that his performance of that work was intended by him and relied on by others in government as part of the business of government in order to carry forward its affairs as a whole.

Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach,* 20 Am. Crim. L. Rev. 423, 438 n. 130 (1983), quoting *Margiotta* record, second trial. Margiotta fit easily within the vague boundaries of this test. As Judge Winter in his powerful dissent, stated, "Given this sweeping charge and the majority opinion, no amount of rhetoric seeking to limit the holding to the facts of this case can conceal that there is no end to the common political practices which may now be swept within the ambit of mail fraud." *Margiotta,* 688 F. 2d at 140 (Winter, J., dissenting).

Judge Winter further stated that "[t]he majority's use of mail fraud as a catch-all prohibition of potitical disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." *Id.,* 688 F. 2d at 139 (Winter, J., dissenting). He added: "The proposition that any person active in political affairs who fails to disclose a fact material to that participation to the public is guilty of mail fraud finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation." *Id.,* 688 F. 2d at 142 (Winter, J., dissenting).

The majority in *Margiotta* expanded the mail fraud statute further than any other court. Because Margiotta was a de facto public official who was relied upon by others for the administration of governmental affairs, the majority found that he did owe a fiduciary duty to the general citizenry. Margiotta had a "stranglehold" on government. "Everything went through his hands . . . [H]e acted as a virtual Department of Personnel, with substantial power over decisions concerning hiring, promotions and salary increases." *Margiotta,* 688 F. 2d at 122.

In contrast, in the present case, Hunt was characterized as the Democratic Party Chairman who influenced some decisions of a state official. He was not a de facto public official actually making such decisions nor did others rely on him to do so. Because Hunt was not a de facto public official, he, therefore, had no fiduciary duty to the public.

In dismissing the mail fraud charges in *United States* v. *Freedman,* 568 F. Supp. 450 (N. D. Ill. 1983), the court held:

> Judge Kaufman's extended comments make it clear Section 1341 was able to reach private citizen Margiotta on an "intangible rights" theory *only* because:
>
> 1. Margiotta's actual "stranglehold" over local governments meant (a) others could reasonably rely on his relationship to government power and (b) he in fact made government decisions; and

2. Margiotta's actual participation in government gave rise to a fiduciary duty to the citizenry. *Id.*, 568 F. Supp. at 455-456. The *Margiotta* court placed great emphasis on its defendant's exercise of de facto public power. In the present case, Hunt did not have a "stranglehold" over government nor did he make government decisions. Hunt participated in government as the Democratic Party Chairman whose duties were "to handle the patronage" and "helping people that are friendly with the Administration." [T.E. I: 4, 7.] His influence in government decisions was limited to suggesting that Insurance Commissioner McGuffey award the workmen's compensation policy to Wombwell Insurance Agency and to directing Wombwell as to the manner in which excess premium commissions were to be distributed. *Gray*, 790 F. 2d at 1296.

The Eighth Circuit, in *United States* v. *Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979), reversed the mail fraud convictions of the Missouri state legislator. The court found that Rabbitt's conduct of accepting a ten percent commission on architectural contracts awarded to the Berger-Field firm and concealing or failing to disclose his interest in those contracts did not violate the mail fraud statute.

> The state officials who awarded architectural contracts did so on merit. There is no evidence that Rabbitt's use of his friendship, position, and influence to aid Berger-Field in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.

> We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and fairness in the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. There is no evidence that Rabbitt failed to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of Berger-Field. In this respect, the case resembles *United States* v. *McNeive*, 536 F. 2d 1245 (8th Cir. 1976), in which the chief plumbing inspector for the City of St. Louis accepted unsolicited gratuities from plumbing contractors. While McNeive benefited from his office in a reprehensible way, his conduct neither injured the Government nor affected the performance of his duties and therefore did not violate federal law. We held that McNeive did not commit fraud by defrauding citizens of a right to "honest and faithful service."

Rabbitt, 583 F. 2d at 1026.

Similarly, in the case at bar, Hunt's use of his influence to aid Wombwell in obtaining the workmen's compensation policy for the state did not result in any tangible loss to the citizenry or the state. [T.E. II: 68-69.] Further, Hunt, in his capacity as Chairman of the Democratic Party, merely used his influence with McGuffey in awarding state insurance contracts, and by no means controlled the awarding of such contracts. McGuffey's testimony was that, "After Governor Carroll came into office he told me that Sonny Hunt would be the one who would suggest who I give insurance to." [T.E. II: 11-12.] McGuffey did con-

sult with Hunt regarding the renewal and placement of state insurance, but he did not consult with Hunt in all such matters, and he did not always follow Hunt's suggestions. [T.E. II: 15, 16.] It is apparent that Hunt never "had a stranglehold" on government "affairs as a whole" as, for instance, a Margiotta had. As a factual matter, Hunt was only fulfilling his duties as Democratic Party Chairman by "helping people who are friendly with the Administration."

The *Margiotta* majority's narrow holding should be limited to the facts of that case. The fiduciary duty to disclose should not be imposed unless the person steps from the role of party leader influencing governmental decisions into the role of a de facto public official actually making such decisions. *Id.*, 688 F. 2d at 122. In the present case, Hunt never stepped out of his role as a party leader into the role of a de facto public official. Therefore, his conduct should not fall under the "intangible rights" theory of the mail fraud statute. And, furthermore, the mail fraud statute should not be expanded to include the conduct of petitioners in the present case who were accused of conspiring with Hunt.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals affirming the district court's expansion of the federal mail fraud statute to a person who holds no position in government should be reversed. The Sixth Circuit's affirmance of the petitioners' convictions based on an expansion of the "intangible rights" theory of the mail fraud statute was improper. This Court has never approved the expansion of the mail fraud statute to include an "intangible rights" theory and should not do so now.

In this case the petitioners were accused of conspiring with Hunt, the Democratic Party Chairman. They were convicted on the theory that Hunt owed a fiduciary duty to the citizens of the state because he exercised influence over some decisions of a state official. This is an expansion of the Second Circuit's holding in *United States* v. *Margiotta* that is unwarranted.

For the reasons set forth above, the Petitioner McNally respectfully requests this Honorable Court to reverse the decision of the Sixth Circuit Court of Appeals which affirmed the district court's expansion of 18 U.S.C. § 1341.

Respectfully submitted,

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PETITIONER'S

BRIEF

Nos. 86-234 and 86-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES J. McNALLY,
Petitioner

v.

UNITED STATES OF AMERICA

JAMES E. GRAY,
Petitioner

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER GRAY IN NO. 86-286

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1341, which makes mail fraud a federal crime, can properly be applied to an alleged breach of fiduciary duty owed to the public which causes no economic harm and, if so, whether someone who holds no public office can defraud the public of "intangible political rights."

2. Whether, when alternative objects of a conspiracy are submitted to the jury in a prosecution under 18 U.S.C. § 371 and a general verdict is returned, the court of appeals can affirm a conviction without considering the sufficiency of the evidence on both of the objects presented to the jury.

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BRIEF FOR PETITIONER GRAY IN NO. 86-286

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 790 F.2d 1290. No opinion of the district court is reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1986. Pet. App. 19a. A timely petition for re-

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[1] Pet. App. refers to the appendix to the petition in No. 86-286, unless otherwise noted. C.A. App. refers to the joint appendix filed in the court of appeals below.

hearing was filed by petitioner Gray on May 23, 1986, and was denied by the court on June 27, 1986. Pet. App. 20a. The petition for a writ of certiorari was filed on August 22, 1986. The petition was granted limited to the questions now presented in this brief on December 8, 1986, and the case was consolidated with *McNally* v. *United States*, No. 86-234.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 371 provides, in pertinent part:

If two or more persons conspire . . . to commit any offense against the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purposes of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

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[2] Petitioner Charles J. McNally is affected by and seeks reversal of his conspiracy conviction on the basis of issue number two presented herein.

STATEMENT

The government's theory in this case extended the mail fraud statute far beyond its traditional bounds. The prosecutor argued that the jury could convict petitioners of mail fraud because they aided and abetted a political party leader's operation of a patronage system in alleged breach of a fiduciary duty the party leader owed to the citizens of the state. The government did not allege and did not prove that this purported breach caused any economic injury to the state or its citizens or that there was a clearly defined state law duty imposed upon any non-governmental officials to conduct their affairs "honestly and impartially." Following the jury trial in the United States District Court for the Eastern District of Kentucky, petitioners Gray and McNally were each convicted on one count of mail fraud, in violation of 18 U.S.C. § 1341. They were also convicted on one count of conspiracy both to defraud the citizens of Kentucky of their intangible right to have the Commonwealth's business conducted impartially and to defraud the United States by impeding the Internal Revenue Service's assessment of taxes, in violation of 18 U.S.C. § 371.[3] Petitioners were sentenced under 18 U.S.C. § 4205(c) for a study prescribed in Section 4205(d). These studies were postponed by the district court pending appeal, and both petitioners have been released on bond.

The basis for the government's prosecution was the role of each petitioner in an arrangement where commissions paid to insurance agents for writing worker's compensation insurance for employees of the Commonwealth of Kentucky were shared as a form of political patron-

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[3] The district court dismissed six of the seven substantive mail fraud counts. The government's challenge to that dismissal was rejected by the court of appeals (Pet. App. 14a-16a), with one judge dissenting. *Id.* at 16a-18a. The government did not cross petition on any issues raised concerning these counts.

age. The Commonwealth uses an insurance agent to purchase insurance for state workers from an underwriter. The commission the agent receives for the service of finding an underwriter is negotiated between the agent and the underwriter, resulting in a commission that is a fixed percentage of the amount of the insurance underwritten. C.A. App. 546-59. The commission bears no particular relationship to the amount of work required to write a policy for the Commonwealth. The agent then shares the commission with other agents at the direction of the party in power.

It was undisputed at trial that in Kentucky the practice of sharing commissions among insurance agents is both a common and lawful practice and extends beyond its use as political patronage in this case. C.A. App. 336-37. Thus, for instance, if a church seeks to obtain a liability insurance policy that requires a large insurer to underwrite it, the church often will choose one parishioner to serve as agent for the purchase of insurance with the understanding that the commission for writing that policy will be split with other parishioners who also are insurance agents. In this way the church avoids having to choose among its members upon whom to confer a particular benefit. C.A. App. 336-37. The arrangement that gave rise to petitioners' convictions is not materially different from this type of arrangement.

The evidence relevant to the government's theory of criminal responsibility as presented to the jury was as follows. In 1974, when Julian Carroll, a Democrat, became Governor of Kentucky, it was necessary for the Commonwealth to choose an agent for the purchase of worker's compensation insurance for state employees from an underwriter. Since 1971 the agent had been the Wombwell Insurance Agency. Pet. App. 2a. Wombwell contacted Howard P. Hunt, the Chairman of the Kentucky Central Executive Committee of the Democratic Party, about the possibility of continuing as the Commonwealth's

agent for worker's compensation insurance.[4] Pet. App. 2a.

Hunt offered to recommend Wombwell as long as it continued its practice of agreeing to share commissions with other insurance agencies designated by Hunt. Pet. App. 3a. Wombwell agreed and was recommended by the state insurance commissioner to the state Personnel Department which purchased insurance. C.A. App. 321, 328-29. The Personnel Department appointed Wombwell as the agent for worker's compensation insurance with the understanding that Wombwell would receive $50,000 in commissions per year. Pet. App. 3a.

Over a period of four years, Hunt designated 21 insurance agencies to share the commissions. The total amount of commissions was $851,000. Pet. App. 3a. Of that amount, $200,000 was delivered to Seton Investments, Inc. Pet. App. 3a. Petitioner McNally, a businessman who had worked in the Governor's campaign, was the sole recorded shareholder of Seton. C.A. App. 1201-02. He personally received $77,500 in shared commissions. Pet. App. 4a. Petitioner Gray was neither a board member, officer nor a shareholder of Seton during the period relevant to this case.[5] C.A. App. 302. He did not receive any of the commissions. C.A. App. 303, 487-88.

The only possible victims of a "fraud" in this case are the citizens of Kentucky; none of the insurance com-

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[4] Hunt was later indicted for his role in the insurance commission sharing arrangement. He pled guilty to one count of mail fraud. Pet. App. 2a.

[5] Petitioner Gray became the Secretary of Public Protection and Regulation in January 1976. In that capacity, he acted as a liaison between the Governor and the Commonwealth's Department of Insurance, but had no supervisory control or authority over the Personnel Department, which actually selected the agent for worker's compensation insurance. At the time of his appointment, petitioner Gray severed all ties to Seton to avoid any conflict of interest.

panies were deceived by the patronage arrangement. But, it is uncontested that the citizens of Kentucky suffered no economic harm as a result of the patronage system of splitting insurance commissions. The Commonwealth was required by law to obtain worker's compensation insurance on its employees. All companies underwriting various types of worker's compensation policies in Kentucky charged the same rate, which was set by a regional insurance board in Alabama. The amount paid by the Commonwealth on these policies was not affected in any way by (1) the choice of agencies to write the policies, (2) the choice of companies to underwrite the policies, (3) the amount of the commission paid by the underwriters to the agents or (4) the amount of that commission shared by the writing agent with other agents. C.A. App. 343-46, 558-60.

The government's theory of criminal liability was that petitioners were guilty of mail fraud, under what has come to be known as the "intangible rights" doctrine. Under this doctrine the government was not required to prove any injury to any economic interest of the "defrauded" victim in order to prosecute petitioners for engaging in a "scheme to defraud" within the meaning of 18 U.S.C. § 1341. Instead, the government only needed to prove that the public was deprived of intangible rights to honest and impartial government and that the mails were used as an essential part of the scheme.

The jury was instructed that it could find petitioners guilty of conspiracy to commit mail fraud under that theory. The district court instructed the jury that it could convict if it found that Hunt had sufficient power over public officials that he could control whether Wombwell would be selected as the agent for worker's compensation insurance and that he directed that money be delivered to Seton without disclosing that his son, Alan Hunt, was an officer and employee of Seton. Petitioners would be guilty if the jury found that they "aided and

abetted Mr. Hunt in that scheme."[6] C.A. App. 1343. The charge for conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371, required the jury to find that Hunt had control over Wombwell's selection and that Hunt breached a duty he owed to disclose his commission sharing agreement with Wombwell to appropriate state officials. In addition, the jury had to find that petitioners entered into a secret agreement with Hunt to control and distribute commissions through Seton. C.A. App. 1335.

A second conspiracy theory (the so-called *"Klein"* objective) charged that petitioners sought to defraud the United States by filing false income tax returns. See *Klein* v. *United States*, 247 F.2d 908 (2d Cir. 1957). Petitioner Gray allegedly failed to disclose his alleged ownership interest in Seton. Petitioner Gray had argued that there was no evidence to support a claim that he had any ownership interest in Seton.[7] Petitioners were each convicted of one count of substantive mail fraud (Count 4), and one count of conspiracy to defraud the United States (Count 1).

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[6] The jury was also instructed that it could convict petitioners if it found that Gray, as a public official, had supervisory authority over the state's worker's compensation insurance and that he failed to disclose to appropriate public officers an alleged ownership interest in Seton. C.A. App. 1343-44. This alternative theory has no independent significance in this case because in order to uphold the mail fraud conviction, the government must show that both theories are legally sufficient. *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931).

[7] Although Count 4 of the indictment charged defendants with a substantive mail fraud violation, the court instructed the jury that they could find petitioners guilty of that count if they found that petitioners devised either a scheme to defraud intangible rights or a scheme to impede the Internal Revenue Service. C.A. App. 1341-42. This instruction was clearly a mistake by the court, which had previously dismissed six substantive mail fraud counts based on tax objectives. However, this erroneous instruction is not at issue in this case.

The court of appeals affirmed petitioners' convictions. Pet. App. 1a-18a. With respect to Hunt, the court acknowledged that he was not a public official, but held that the mail fraud statute prohibits any breach of a fiduciary duty to the public and that any individual who substantially "participate[s] in government operations" may "assume a fiduciary duty to the general citizenry." Pet. App. 9a.

The court then devised its own test for determining a defendant's fiduciary status—" 'a de facto control test, under which a person who in fact makes governmental decisions may be held to be a governmental fiduciary . . . .' " *Id.* at 10a, quoting *United States* v. *Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). The court applied this test and found that Hunt had adequate control over state officials to impose upon him a duty to disclose to the Commonwealth his relationship to Seton, that relationship apparently consisting of his son's position as an officer and employee of Seton. In addition, the court asserted that petitioner Gray had "aided and abetted Hunt's fraud." Pet. App. 11a.

The court of appeals then declined to consider petitioner Gray's contention that the jury verdict on the conspiracy count could not be upheld because there was no evidence that Gray had interfered with the federal government's ability to assess taxes. Without citation to any cases, the court held in a footnote that because the government had satisfied its burden in proving at least one object of the conspiracy, which was to deprive Kentucky citizens of intangible rights, it was unnecessary for a reviewing court to decide whether there was evidence to support any of the other objects of the conspiracy about which the jury was instructed. Pet. App. 11a n.2.

SUMMARY OF ARGUMENT

I.

Petitioner Gray's conviction in this case under the so-called "intangible rights" doctrine involves an extraordinary extension of the federal mail fraud statute, 18 U.S.C. § 1341, to conduct that Congress clearly never intended to make criminal. Gray is guilty of a crime only if Hunt's patronage arrangement violated the prohibition against mail fraud. But, because of its reliance upon an intangible rights theory, the government never attempted to prove that the arrangement caused any economic injury to anyone and never attempted to prove that state law imposed any enforceable fiduciary duties upon Hunt as a political party leader. The absence of such proof is fatal to the government's attempt to prosecute Gray under Section 1341.

A. Injury to one's property rights is a necessary element of mail fraud. The statute, by prohibiting private frauds employing the mails, incorporates the common law meaning of fraud, which has traditionally required economic injury to the victim. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Services Co.*, 341 U.S. 246 (1951). This understanding is reinforced by the explicit reference to "obtaining money or property" in the statute, which in context, clearly indicates that Congress assumed that the purpose of a scheme to defraud within the meaning of Section 1341 is to obtain money or property.

This reading is directly supported by the legislative history of the Act. The history of the original Act is quite sparse, but it indicates that Congress only intended to outlaw common swindles where the mails were used by the wrongdoer. The limited scope of the original Act was confirmed by the 1889 amendment which listed specific schemes that the Act prohibited. This amendment

indicates that the original language was not understood by Congress to encompass all morally questionable acts employing the mails. Act of March 2, 1889, ch. 393, § 1 25 Stat. 873. This understanding was reinforced in 1909 when Congress codified *Durland* v. *United States*, 161 U.S. 306 (1896), by making clear that false promises to obtain property or money violated the Act just like common law "schemes to defraud" which required false representations of fact. The 1909 amendment indicated that Congress assumed that a necessary element of fraud in Section 1341 is injury to money or property.

This Court has never endorsed the intangible rights theory of mail fraud. To the contrary, this Court has assumed that a scheme to defraud requires "wronging one in his property rights by dishonest methods or schemes." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). The Court has consistently rebuffed efforts by the government to expand the scope of the mail fraud statute. See, *e.g.*, *Fasulo* v. *United States*, 272 U.S. 620 (1926); *Parr* v. *United States*, 363 U.S. 370 (1960); *United States* v. *Maze*, 414 U.S. 395 (1974).

The government's attempt to apply the mail fraud statute to conduct not clearly embraced by its language by eliminating the element of injury to property rights is wholly inconsistent with traditional principles of statutory construction in criminal cases. First, the rule of lenity requires that any ambiguity in the statute must be resolved in the defendant's favor. Second, if fraud under Section 1341 is not given its traditional common law meaning, it is virtually impossible for a person of average intelligence to determine what is declared criminal by the statute. Finally, fraud is an area traditionally regulated by state law and this Court has consistently required a clear statement of congressional intent before allowing federal criminal statutes to be extended concurrently into the domain of state regulation. *United*

States v. *Bass*, 404 U.S. 336 (1971). Section 1341 is not sufficiently clear to support expanding its prohibition to schemes that cause no injury to property.

B. This Court has stated that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980). However, there is no state law or contract that establishes the duty of a political party leader to disclose the existence of a patronage system. Nor can such a duty be found in the mail fraud statute itself; it relies upon other sources of law to define what constitutes a "scheme to defraud." *Parr* v. *United States*, 363 U.S. 370 (1960). Thus, even if the Court were to accept the government's argument that Section 1341 extends to some schemes that harm intangible as opposed to property rights, there could be no finding of a violation here because there has been no breach of a state law duty.

In refusing to require the government to prove that Hunt breached a clearly defined state law duty, the court below exceeded its authority by creating a federal common law of crimes, in violation of the doctrine of separation of powers. Furthermore, the extension of Section 1341 to injuries to intangible political rights of state citizens constitutes a serious and unwarranted federal invasion into legitimate state prerogatives. Compare *United States* v. *Bass*, 404 U.S. 336 (1971). The government's theory also creates a serious risk that federal prosecutors could misuse the statute to harass state and local officials and party leaders who maintain political views contrary to those of the United States Attorney. See *United States* v. *Margiotta*, 688 F.2d at 139 (Winter, J., dissenting). Without a clear indication of congressional intent to extend federal criminal law into such matters that fundamentally touch state and local gov-

ernments, the Court should reject the proposed extension of Section 1341.

II.

This Court should hold that a reviewing court must consider the sufficiency of the evidence on each alternative object of the conspiracy presented to the jury before upholding a conspiracy conviction. Such a holding is required by this Court's decisions in *Cramer* v. *United States*, 325 U.S. 1 (1945), and *Yates* v. *United States*, 354 U.S. 298 (1957) which, in effect, hold that a conspiracy verdict must be set aside if any of the separate acts of the conspiracy presented to the jury are without legal or factual support. *Cramer* v. *United States*, 325 U.S. at 36 n.45. The government's attempt to distinguish the sufficiency of the evidence issue presented here from other legal errors is unsupported by this Court's decisions. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

The jury in this case was instructed that a conviction for conspiracy to defraud the United States could be based either upon a mail fraud object or upon an object of impeding the Internal Revenue Service. The jury returned a general verdict, making it impossible to tell which of the two objects the jury found to be the basis of its decision. In order to ensure that the petitioners were not convicted of a conspiracy whose object was not supported by legally sufficient evidence, the court of appeals was required to review *each* conspiratorial object.

ARGUMENT

I. 18 U.S.C. § 1341 IS NOT VIOLATED BY THE FAILURE OF A PRIVATE CITIZEN TO DISCLOSE ACTIONS WHICH ALLEGEDLY DEPRIVE CITIZENS OF A STATE OF THEIR INTANGIBLE RIGHT TO HONEST GOVERNMENT.

Petitioners were convicted for their parts in a political patronage arrangement in which a political party leader designated which insurance agents would share commissions obtained for the purchase of worker's compensation insurance for state employees. At the outset, it is critical to understand what is *not* at issue in this case. First, the fact that petitioner Gray held public office is completely irrelevant. The jury was permitted to convict petitioners for aiding and abetting Hunt, who was not a public officeholder.* Second, the government did not allege or attempt to prove that the citizens of Kentucky paid one cent more because of the commission-splitting arrangement than they otherwise would have for worker's compensation insurance. Third, neither Gray nor Hunt received any of the insurance fees.

Thus, petitioner Gray's conviction in this case can only stand (a) if 18 U.S.C. § 1341 does not require economic

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* The United States in its opposition pointed out (U.S. Br. in Opp. 4) that the jury had been instructed under the mail fraud count that it could convict defendants if it found that Gray had violated duties he owed to the public as an officeholder. That was, however, an alternative theory and the jury rendered a general verdict. Accordingly, under settled principles of due process, petitioners cannot be convicted unless the instruction concerning Hunt was also legally sufficient to support a conviction. *See Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Dunn* v. *United States*, 442 U.S. 100, 107 (1979); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). *See also* U.S. Br. in Opp. 7 n.5. For reasons stated *infra*, pp. 14-30, the alternative instruction concerning Gray is also legally insufficient because there was no allegation that the citizens of the Commonwealth of Kentucky suffered any pecuniary loss as a consequence of the alleged "scheme to defraud."

harm to the victim of the alleged scheme to defraud *and* (b) if Section 1341 imposes independent fiduciary duties to inform state officials that a political patronage system existed.[9] Such a construction of 18 U.S.C. § 1341 is inconsistent with its language and legislative history and it finds no support in any decision of this Court. Moreover, the government's overreaching interpretation completely undermines the rule of lenity in criminal cases and disturbs the state-federal balance in the sensitive area of internal state politics. Accordingly, petitioner Gray's conviction must be reversed.

A. A "Scheme To Defraud" Within The Meaning Of 18 U.S.C. § 1341 Requires An Injury To The Victim's Property And Does Not Embrace Injuries To Mere Intangible Rights.

1. *The Language of 18 U.S.C. § 1341 Does Not Support Petitioner Gray's Conviction.* It is axiomatic that to determine the scope of any statutory provision, including a criminal statute, analysis must begin with an examination of the plain meaning of the language. See, *e.g.*, *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) and *United States* v. *Bass*, 404 U.S. 336, 339 (1971). Section 1341 makes it a criminal offense for a person to utilize the mails in conjunction with "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ."

[9] It is worth noting that the government failed to specify which public officials Hunt should have informed. This "failure" is understandable given that all conceivably relevant public officials already knew that the insurance commission splitting arrangement was a part of the political patronage system. For instance, Harold McGuffey, the Commissioner of Insurance from 1971 to 1979, himself accepted virtually all of Hunt's recommendations of suitable agents to write insurance policies for the state (C.A. App. 229-31, 330), and he wrote a letter to Wombwell advising Wombwell that it was legal to share insurance commissions with a licensed officer of an unlicensed agency. C.A. App. 350-51.

The language of the statute forbids primarily traditional private frauds employing the mails. Accordingly, when Congress enacted this law, it had uppermost in its mind actionable fraud at common law,[10] which required at least some pecuniary injury to the victim that could be measured. As this Court has interpreted the common law term "fraud" in another context, "the acts charged do not amount to fraud unless there has been an unreasonable charge. Injury is an essential element of remediable fraud. 'Deceit and injury must concur.'" *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 253-54 (1951), quoting *Adams* v. *Clark*, 239 N.Y. 403, 146 N.E. 642, 644 (1925).[11]

[10] It is well settled that, when Congress uses a common law term, absent evidence to the contrary, it is assumed that Congress intended the term to have its common law meaning. *See United States* v. *Turley*, 352 U.S. 407, 411 (1957); *United States* v. *Carll*, 105 U.S. 611 (1881).

In *Durland* v. *United States*, 161 U.S. 306 (1896), this Court refused to limit the term "scheme to defraud" to misrepresentations of present or past fact as would have been required for common law fraud. The Court did not hold that the common law meaning of fraud was irrelevant, but rather that any actions designed to achieve the same result as fraud—obtaining money or property by deceit—fell within the statute's prohibition. *Id.* at 313-14. This interpretation was based on the use of the term "scheme or artifice" in the statute. The interpretation of the court of appeals in this case depends on a meaning of "fraud" which is totally alien to any common law interpretation. Nothing in *Durland* suggests that Congress intended its use of the term "fraud" in Section 1341 to be wholly divorced from any common law use of the word.

[11] *See In re Waterman*, 29 Nev. 288, 299, 89 P. 291, 295 (1907); *Jamison* v. *State*, 37 Ark. 445 (1881). Accord, *Connor* v. *State*, 29 Fla. 445, 10 So. 891 (1892); *State* v. *Clark*, 72 Iowa 30, 33 N.W. 340 (1887); *State* v. *McGinnis*, 71 Iowa 685, 33 N.W. 338 (1887); *State* v. *Anderson*, 47 Iowa 142 (1877); *State* v. *Lewis*, 26 Kan. 123 (1881); *Bracey* v. *State*, 64 Miss. 17, 8 So. 163 (1886); *Willis* v. *People*, 26 N.Y. Sup. Ct. 84 (App. Div. 1879); *Connelly* v. *Bartlett*, 286 Mass. 311, 190 N.E. 799, 801 (1934). 1 J. Bishop,

This understanding is reinforced by Congress' specific reference to "obtaining money or property" by false pretenses which follows after the reference to "scheme to defraud." The plain inference from this language is that Congress assumed that fraud has as its object "obtaining money or property." [12] The language of the statute thus provides no basis for a conviction where the alleged deceit caused no injury to any tangible property of the victim of the scheme to defraud.[13] But that is all the government has charged and proved in this case. Thus, to cover these facts, the government must "slight[] the wording of the statute." *Williams* v. *United States*, 458 U.S. 279, 286 (1982); *United States* v. *Enmons*, 410 U.S. 396, 399 (1973).

This Court's analysis of similar language in Rule 10b-5, implementing the Securities Exchange Act, applies with equal force to this case:

> To the extent that the Court of Appeals would rely on the use of the term "fraud" in Rule 10b-5 to bring within the ambit of the Rule all breaches of fiduciary duty in connection with a securities transaction, its interpretation would . . . "add a gloss to the operative language of the statute quite different from its commonly accepted meaning."

Commentaries on the Criminal Law §§ 565-590 (7th ed. 1882) (major fraudulent crimes classified as crimes against property).

[12] The legislative history concerning the addition of this phrase is discussed *infra* at pp. 20-22.

[13] Even if "fraud" within the meaning of Section 1341 included gain to the perpetrator without any loss to the victim, the statute still was not violated in this case. Petitioner Gray received nothing of value as a result of the splitting of insurance commissions. Shortly after accepting his position in state government, Gray resigned as an officer and director of Seton in order to avoid any potential conflict of interest. C.A. App. 302, 486. He did not receive any portion of the commissions shared by Wombwell, through Seton or otherwise. *See* C.A. App. 487-88, 303.

Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462, 472 (1977), quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976). For the same reason that this Court interpreted the term "fraud" narrowly in *Santa Fe Industries, Inc.*, it should do so here.

2. *The Legislative History Supports A Narrow Interpretation of 18 U.S.C. § 1341.* The legislative history reveals that Congress did not intend the mail fraud statute to confer upon the federal government a roving commission to ensure that the mails are not used in any way which federal prosecutors believe to be "wrong." Instead, Congress merely intended to forbid "pecuniary or property injury inflicted by a scheme to use the mails for the purpose." *Hammerschmidt* v. *United States*, 265 U.S. 182, 189 (1924).

a. The original mail fraud statute was enacted on June 8, 1872. It was one section of a 327-section omnibus act [14] that chiefly codified and revised the laws regulating the post office. The mail fraud provision, Section 301, had no precursor and was added without congressional debate or other statement of legislative intent. Like the other antifraud provisions of the 1872 Act (including provisions aimed at lotteries and other games of chance), the mail fraud section was suggested by a committee of postal officers who were concerned that the language proposed by the postal commission would not give the post office power "to prevent the frauds which are perpetrated by lottery swindlers through the mails . . . ." [15]

Using the language still retained today, Section 301 proscribed "any scheme or artifice to defraud." This language covered principals as well as agents of the fraudulent scheme, and encompassed schemes to obtain property as well as those to obtain money. This was

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[14] Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

[15] Report of the Postal Committee, March 30, 1870, 19-20.

in contrast to Section 149 of the original act, proposed by the postal commission, which was limited to punishment of the person who physically mailed "letters or circulars concerning illegal lotteries . . . or other similar enterprises" and was limited to schemes devised to defraud the public "for the purpose *of obtaining money* under false pretenses."[16] According to Congressman Farnsworth, the sponsor of the legislation, the mail fraud provisions were necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[17]

While the original mail fraud statute appears to have been intended by Congress to prevent the perpetration of a wide range of schemes to defraud that utilized the federal mails, there was nothing in the initial reports, drafts, congressional debates or proposed sections that supports the suggestion that Congress intended to proscribe "frauds" designed to deprive people of anything other than money or property.

b. Congress amended the mail fraud statute in 1889, adding specific, enumerated prohibitions against a variety of then-common frauds involving counterfeit money.[18]

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[16] Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302 (repealed 1909) (emphasis added).

[17] Cong. Globe, [illegible] Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). These remarks were made during the debate on H.R. 2295, the recodification legislation of the Forty-First Congress. The Bill was not passed by that Congress, but was reintroduced (with the fraud sections intact) and passed by the Forty-Second Congress as the Act of June 8, 1872, ch. 335, §§ 149 & 301, 17 Stat. 302 & 323.

[18] The two principal schemes, very common in the late nineteenth century, were called the "green article" scheme and the "sawdust swindle." In the "green article" scheme, letters were mailed offering to sell counterfeit money ("green articles") at a fraction of face value, which the buyer could then pass off as a legal tender. In a variation of the scheme known as the "sawdust swindle," the schemer never intended to sell any counterfeit money, rather he pocketed the money sent to him, knowing his victim, who had attempted illegally to buy counterfeit tender, would have no recourse. *See Milby* v. *United States*, 120 F. 1 (6th Cir. 1903) and *Lehman* v. *United States*, 127 F. 41 (2nd Cir. 1903). *See generally* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 797-98 (1980).

Subtitled "An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails," the amendment added a prohibition against

> what is commonly called the "sawdust swindle," or "counterfeit money fraud," . . . [perpetrated by those] dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .[19]

The Senate report accompanying this amendment consists in the main of four letters, each from postal officials, decrying "an acknowledged evil of great magnitude," namely, the use of the mails to perpetuate counterfeit money frauds.[20] There is no other legislative history associated with the 1889 amendment.

This amendment on its face suggests that the original prohibition against "any scheme or artifice to defraud" was not expansive in scope. If the original phrase had been intended to be broadly construed by the courts, there would have been no need for the specific 1889 amendment.[21] This amendment is fully consistent with

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[19] Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873.

[20] S. Rep. No. 2506, 50th Cong., 2d Sess. 2-4 (1889).

[21] Comments, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*,

the interpretation that "any scheme or artifice to defraud" was intended to apply to traditional frauds involving injury to money or property.

c. During the course of a general revision of the federal penal code, Congress amended the mail fraud statute once again in 1909, adding the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original prohibition against "any scheme or artifice to defraud." [22] There are no direct legislative statements concerning the purpose of this amendment; the bill's sponsor merely indicated that this change did not require any explanation.[23]

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47 U. Chi. L. Rev. 562, 569 (1980). For example, in the first reported case interpreting the 1889 amendment, the court held that a scheme which "deprive[d] another of his right" (in this case large amounts of money) was no longer covered by the mail fraud statute because the 1889 amendment had *limited* the statute's scope to schemes, like those enumerated, which were "gainful to the wrongdoer," *United States* v. *Beach*, 71 F. 160, 160-61 (D. Colo. 1895).

The amendment could be read as reflecting mere congressional outrage at the evil of using the mails to offer counterfeit money for sale, even though such a scheme might have been unlawful under a broad reading of the original 1872 language "any scheme or artifice to defraud." *See United States* v. *Jones*, 10 F. 469 (C.C.S.D.N.Y. 1882), holding that "[a]ny scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of [the mail fraud statute], and a scheme to put counterfeit money in circulation is such a scheme." *Id.* at 470. This reading still would not justify applying Section 1341 to schemes to deprive someone of intangible rights.

[22] Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. There were other amendments to the mail fraud statute also adopted at that time, including an excision of language that had focused on "misusing the post-office establishment" as an essential element of the offense.

[23] *See* 42 Cong. Rec. 1026 (1908) (remarks of Sen. Heyburn).

The effect of the change was to codify this Court's decision in *Durland* v. *United States*, 161 U.S. 306 (1896), in which the Court rejected a defendant's argument that a scheme to defraud within the meaning of the statute does not encompass fraudulent misrepresentations and promises about the future.[24] In *Durland*, the Court held that "[s]ome schemes may be promoted through mere *representations and promises* as to the future, yet are none the less schemes and artifices to defraud." 161 U.S. at 313 (emphasis added). That language was echoed in the 1909 amendment by its reference to "representations or promises." That Congress merely intended to codify *Durland* is supported by the citation to that case next to the new mail fraud language in the draft proposed by a Commission appointed in 1901 to prepare the revised criminal code.[25] The language proposed by the Commission was adopted unchanged and without discussion by the Congress.

The language used, however, strongly suggests that Congress itself understood fraud to be limited to efforts to obtain "money or property" by false promises or representations. That is why it specifically defined what methods to achieve the criminal goal of obtaining money or property, other than common law fraud, were covered by the statute. The 1909 amendment thus strongly undermines the holding below and those of other courts of appeals that Congress intended fraud to cover conduct

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[24] *See, United States* v. *Margiotta*, 688 F.2d 108, 141 n.4 (Winter, J. dissenting); Comments, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 570-72 (1980); Pearce, *Theft By False Promise*, 101 U. Pa. L. Rev. 967, 980 (1953).

[25] *See* S. Doc. No. 68, pt. 2, 57th Cong., 1st Sess. 63 (1901) (Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States).

that was designed to do anything other than obtain money or property by deceit or trickery.[26]

In sum, not one word in the legislative history of 18 U.S.C. § 1341 indicates that Congress intended the term "scheme to defraud" to extend to injury to intangible rights. To the contrary, Congress seemed clearly to have assumed that the statute was confined to respond to a serious, but still limited problem—schemes using the mails to cheat innocent people out of their property. The Act broadly prohibits such conduct, regardless of the nature of the scheme. But the legislative history conclusively shows that Congress did *not* prohibit all uses of the mails that may offend a federal prosecutor, which is what is required to sustain petitioners' convictions in this case.

3. *This Court's Decisions Assume That 18 U.S.C. § 1341 Requires Proof Of Economic Injury To The Victim Of A Scheme To Defraud.* No case in this Court has dealt directly with the intangible rights doctrine. Nevertheless, this Court's decisions interpreting the mail fraud statute have indicated that it is limited to deceitful actions designed to injure someone's property rights.

One of the first decisions of this Court interpreting what is now Section 1341 in light of the 1909 amend-

[26] Congress amended the mail fraud statute once again in 1948, removing language that had been added in 1889 to cover various counterfeiting schemes. Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763. According to the House Report accompanying the bill, the amendment was designed to delete "[t]he obsolete argot of the underworld" and this change, along with the deletion of other "surplusage," was meant to simplify the statute "without change of meaning." H.R. Rep. No. 304, 80th Cong., 1st Sess., A100 (1948). Two technical changes were made, one in 1949 to substitute the words "dispose of" for "dispose or," Act of May 24, 1949, ch. 139, § 34, 63 Stat. 89, and the second in 1970 to substitute "Postal Service" for "Post Office Department." Pub. L. No. 91-375, § 6(j)(11), 84 Stat. 719 (1970). Neither change affected the meaning of the statute in any way.

ment by Congress made clear that the mail fraud statute did not outlaw every "bad" act "if use of the mails was part of it . . . ." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924).[27] To the contrary, the Court stated that "intent to defraud in such a statute was satisfied by the wrongful purpose of *injuring one in his property rights.*" *Ibid.* (emphasis added). Distinguishing a lower court decision interpreting the mail fraud statute very broadly to apply to blackmailers, this Court stated: "The decision . . . should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose." *Id.* at 188-89. This limiting construction, the Court pointed out, was supported by the 1909 amendment which made the statute's "scope clearer. " *Id.* at 189.[28]

The limited scope of the mail fraud statute was reinforced two years later in *Fasulo* v. *United States*, 272 U.S. 620 (1926), a case conspicuously not mentioned by the courts of appeals which have endorsed the govern-

[27] *Badders* v. *United States*, 240 U.S. 391 (1916), is not to the contrary. The issue in *Badders* was the constitutionality of the mail fraud statute. Petitioner claimed that it was beyond the power of Congress to apply the Act to a "mere incident of a fraudulent scheme" that itself was outside the jurisdiction of Congress to forbid. 240 U.S. at 393. In response to that challenge, the Court upheld the statute, noting that Congress has the power to forbid use of the mails "in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Id.* Accordingly, in *Badders*, the Court was not called upon to and did not address the question here, whether Congress has, in fact, determined that *anything* contrary to public policy is proscribed by the mail fraud statute. As the Court made clear a decade later in *Hammerschmidt*, Congress clearly did not exercise the full extent of its power in the mail fraud statute.

[28] Because the petitioners in *Hammerschmidt* had not engaged in any deceit or trickery when they counseled young men to violate the Selective Service Act by not registering for the draft, the Court found no conspiracy to defraud the United States and thus overturned their convictions.

ment's "intangible rights doctrine." The Court in *Fasulo* held that the mail fraud statute did not apply to a scheme in which the mails were used for "the purpose of obtaining money by means of threats of murder or bodily harm." *Id.* at 625. It was undisputed that the defendants had sought wrongfully to obtain the property of others, and that the mails had been used in this extortionate attempt. Nevertheless, this Court expressly rejected the government's contention that the mail fraud "statute embraces all dishonest methods of deprivation the gist of which is the use of the mails." *Id.* at 627. The Court again reiterated the interpretation of "scheme to defraud" that it had enunciated in *Hammerschmidt*:

> [T]he words "to defraud" . . . primarily mean to cheat . . . they usually signify the deprivation of something of value, by trick, deceit, chicane or overreaching, and . . . they do not extend to theft by violence, or to robbery or burglary. The reference in [*Hammerschmidt*] to "means that are dishonest" and "dishonest methods or schemes" does not support the government's construction of the phrase.

Id. at 627-28.

The Court continued its discussion, going even further than it had in *Hammerschmidt* in criticizing lower court readings of "scheme to defraud." In no uncertain terms, the Court stated that:

> [t]he rule laid down in [one court of appeals' decision] includes every scheme that in its necessary consequences is calculated to injure another or to deprive him of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used.

Id. at 628-29. Returning to the facts before it, the Court noted that the extortion attempted by the petitioners was not "in the nature of deceit or fraud as known to the law or as generally understood." *Id.* at 629. With no support in the language of the statute or in the common

law for the broad reading urged by the government, the Court rejected the attempt to apply the mail fraud statute to schemes to extort by threat of force.

Fasulo makes clear that not every scheme calculated to injure another or to deprive him of property rights is a "scheme to defraud" within the meaning of the statute. The reasoning in *Fasulo* directly supports petitioner's contention that "scheme to defraud" as used in 18 U.S.C. § 1341 should be construed narrowly to apply only to plots designed to deprive others of their *property* rights. *Fasulo* and *Hammerschmidt* are the only cases which directly deal with the question of whether injury to property rights is a necessary element of an offense under 18 U.S.C. § 1341. More recent mail fraud decisions of this Court lend support to petitioners' theory because they reject overreaching interpretations of the Act by the government,[29] but none discusses the specific issue presented in this case. Accordingly, the most relevant decisions of this Court undermine the government's attempt to extend the phrase "scheme to defraud" to embrace mere injury to intangible rights.

4. *Interpreting 18 U.S.C. § 1314 To Support Petitioner Gray's Conviction Violates Traditional Rules of Statutory Construction In Criminal Cases.* Even if this Court were to conclude that the legislative history and language of the mail fraud statute are ambiguous as to the meaning of the phrase "scheme to defraud," traditional principles of construction of criminal statutes still require the Court to interpret the statute in petitioner's favor and to reject the expansive interpretation of Section 1341 advanced by the government.

a. The rule of lenity, or strict construction of penal statutes, is designed to serve two separate but related

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[29] *See Parr* v. *United States*, 363 U.S. 370 (1960); *United States* v. *Maze*, 414 U.S. 395 (1974).

goals.[30] First, strict construction of penal statutes ensures that citizens have fair notice of what conduct is proscribed by law. Second, the rule of lenity reflects the separation of powers doctrine that the decision to criminalize activities must be made by the legislature. When the present case is examined in light of the purposes of the rule of lenity, it is apparent that the government's interpretation of the mail fraud statute to encompass injuries to mere intangible rights must be rejected.

This Court has long recognized that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), quoted in *United States* v. *Bass*, 404 U.S. 336, 347 (1971). As discussed above at pp. 14-22, it simply cannot be said that Congress has given fair notice, in language that is "clear and definite," that the federal mail fraud statute proscribes conduct which harms intangible rights. The language of the statute, the legislative history and this Court's decisions do not remotely suggest that the mail fraud statute reaches activity aimed at deprivation of anything other than property rights. *Fasulo* v. *United States*, 272 U.S. 620, 628-29 (1926).[31]

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[30] *See generally* H. L. Packer, *The Limits of the Criminal Sanction*, 79-80 (1968); and Duke, *Criminal Law Commentary, Legality in the Second Circuit*, 49 Brooklyn L. Rev. 911 (1983).

[31] To adopt a broader reading in these circumstances would create a serious risk that the statute does not provide fair notice of what is being declared a crime. Obviously, the Act should be construed to avoid creating a constitutional problem. *See, e.g., United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The due process concerns raised by the government's theory of intangible rights are far from hypothetical. Courts have upheld application of the mail fraud statute to such activities as obtaining a driver's license in a fictitious and assumed name, under the theory that the defendant was attempting "to defraud the California Department of Motor Vehicles of its [intangible] right to have its license program administered free from falsehood." *United States* v. *Green*, 577 F. Supp. 935, 936-37 (N.D. Cal. 1984).

By interpreting the mail fraud statute to criminalize conduct which Congress has not clearly placed within the ambit of the statute, the courts and prosecutors are, in effect, exercising lawmaking powers on an *ad hoc* basis in violation of the constitutional requirement of separation of powers. As this Court declared in *United States* v. *Bass*:

> because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

404 U.S. at 348, quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks 196, 209 (1967).

These concerns, which moved the Court to reject, under the rule of lenity, a broad reading of a federal firearms statute in *Bass*, are equally applicable to this case. In the absence of clear statutory language or unambiguous legislative history to support the government's reading of the mail fraud statute, any "ambiguity concerning the ambit of [this] criminal statute should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

The issue here is not whether Congress has the constitutional authority to prohibit the conduct engaged in by petitioners. It is clear from this Court's decision in *Badders* v. *United States*, *supra*, that the postal power provides authority to Congress to criminalize virtually

any act involving use of the mails, including schemes directed at injuring intangible rights. The issue is whether Congress has unmistakably exercised such authority. As this Court has previously recognized when faced with a similar question of the scope of the activities prohibited by the mail fraud statute, "[i]f the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court." *United States* v. *Maze*, 414 U.S. at 405 n.10.

b. When faced with ambiguous statutory language and legislative history, this Court has refused to adopt the government's broad reading of a federal statute, civil or criminal, when that broader reading would "mark a major inroad into a domain traditionally left to the States." *United States* v. *Bass*, 404 U.S. at 339. The definition and administration of criminal laws are matters that traditionally have been of primary concern to the states. Acting pursuant to their general police powers, states prohibit all manner of crimes against personal and property rights and intangible rights. This Court, when reviewing federal attempts to regulate behavior *concurrently* with the states, has held that the federal action was prohibited unless justified by a clear statement of congressional intent.[32] Thus, under *Bass*, absent a clear directive from Congress, adoption of an expansive interpretation of "scheme to defraud" to encompass schemes which injure intangible rights, as urged by the government, would violate fundamental principles of federalism and comity.

In *United States* v. *Bass*, the Court rejected the argument that a federal criminal statute should be expansively interpreted to encompass conduct which could have

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[32] *See, e.g., Williams* v. *United States*, 458 U.S. 279, 290 (1982); *Palmer* v. *Massachusetts*, 308 U.S. 79, 83-85 (1939).

been proscribed by the state. In doing so, the Court explained:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

404 U.S. at 349 (citations omitted).

A reading of the mail fraud statute which would permit the federal government to prosecute perceived state and local political corruption under the theory that the federal government should vindicate local citizens' "right to fair and impartial government" is a significant and unwarranted intrusion by the federal government in "the sensitive relation between federal and state criminal jurisdiction," which requires a much clearer statement from Congress than appears in Section 1341.

In sum, all of the traditional rules for construing criminal statutes weigh heavily against expanding 18 U.S.C. § 1341 beyond schemes which victimize property rights through deceit. Congress has the authority to prohibit conduct such as petitioners', but, if it wishes to do so, it must state its intent explicitly. Since Congress has not, federal courts have no authority to create a federal crime where one does not clearly exist.

5. *The Government Neither Alleged Nor Proved A Violation of 18 U.S.C. § 1341.* The government's theory,

and the district court's charge to the jury, permitted petitioner Gray to be found guilty of violating the mail fraud statute if the jurors found that Hunt, a political party leader who held no public office, failed to disclose to state government officials that he had an interest in Seton Investments, Inc. which would receive shared insurance commissions as part of a political patronage system. The sole basis for petitioners' prosecution under the mail fraud statute is the mere allegation that the petitioners "defrauded" the citizens of Kentucky of "their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud . . . ." C.A. App. 1341. Thus, the government did not charge in its indictment that petitioner had caused the Commonwealth of Kentucky or its citizens any economic injury.

Moreover, the government made no effort to prove that the commission-sharing arrangement injured Kentucky its citizens in their property rights. In fact, there was no such injury. For this reason, the jury was not instructed on this theory. Because 18 U.S.C. § 1341, properly construed, requires some injury to property as a necessary element of the offense, petitioner Gray's conviction cannot stand.

B. A "Scheme To Defraud" Within The Meaning Of 18 U.S.C. § 1341 Requires At Least Proof That A Defendant Breached A Clear Duty Under State Law Or Contract To Disclose Material Facts Which Caused Injury.

1. The judicial extension of 18 U.S.C. § 1341 to cover an alleged scheme to defraud the citizens of a state of intangible, abstract political and civil rights is a comparatively recent, and much criticized, development.[33]

[33] *See, e.g.*, Coffee, *From Tort to Crime*, 19 Am. Crim. L. Rev. 117, 141 (1981); Comments, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 587 (1980); Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 Am. Crim. L. Rev. 423, 425 (1983); Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. Mar. L. Rev. 45, 49 (1980); Fleming, *Thoughts From The Insane Asylum*, 22 Am. Crim. L. Rev. 271 (1984).

Dicta in *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941), evidently spawned the doctrine when the court stated, "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud." In later cases, the citizens of Illinois, among other things, were allegedly defrauded of the "honest and faithful services of" Otto Kerner as governor. *United States* v. *Isaacs*, 493 F.2d 1124, 1149 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). The citizens of Maryland, *inter alia*, were allegedly defrauded of the right to "loyal, faithful, disinterested and honest government" by Governor Mandel's non-disclosure and concealment of material information about a race track. *United States* v. *Mandel*, 591 F.2d 1347, 1359 (4th Cir.), *aff'd per curiam in relevant part*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980). The Second Circuit recently extended this judicially created "fiduciary duty" to a county chairman of a political party who held no public office and only exercised influence over the decisions of a local insurance commissioner. *United States* v. *Margiotta*, 688 F.2d 108 (2nd Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).[34] See note 37, *infra*.

[34] *See United States* v. *Green*, 577 F. Supp. 935 (N.D. Cal. 1984) (indictment upheld charging defendant with defrauding California Department of Motor Vehicles of right to have its program administered free from falsehood and deceit when defendant obtained a driver's license in a fictitious name); *United States* v. *Bronston*, 658 F.2d 920 (2nd Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (court affirmed conviction of attorney who gave legal advice to a client in violation of his ethical duty of loyalty to another client of his law firm, even though there was no damage to either client).

Even if the Court were to accept the argument that Section 1341 extends to some schemes which harm intangible as opposed to property rights, the inquiry remains what is the legitimate source of duties enforced by Section 1341. The doctrine must have some limits. In this case, the Court should require that some legal duty to disclose the patronage arrangement existed in order to establish any kind of "fraud." It was the government that chose to present its case to the jury on the theory that Hunt had a duty to disclose his actions to the public. This was the government's theory because it could not prove that there had been any misrepresentations or other affirmative acts which defrauded anyone. When, as here, "an allegation of fraud is based upon nondisclosure," this Court has made plain that, "there can be no fraud absent a duty to speak." *Chiarella* v. *United States*, 445 U.S. 222, 235 (1980). In this case, no state law establishes any duty enforceable against a citizen, who holds no public office, to ensure honest state government. Nor does state law or any contract impose any fiduciary duty on Hunt, as a political party leader, to reveal the existence of a political patronage system. The absence of any state law duty to disclose this information is fatal to the government's theory.[35]

No such duty arises under the mail fraud statute itself. This Court has made clear that, aside from specifically enumerated methods such as those in the 1889 amendment, Section 1341 requires reference to other sources of law to define "scheme to defraud." See *Parr* v. *United States*, 363 U.S. 370 (1960). In *Parr*, the

[35] The application of the intangible rights doctrine in this case would constitute a much more extreme extension of the statute than in *United States* v. *Mandel* or *United States* v. *Isaacs*, both of which involved defendants who were publicly elected officials. In that capacity they acted as trustees for the citizens of the state in which they were elected, and that trustee relationship arguably formed the foundation for a fiduciary duty under state law to disclose material information. 591 F.2d at 1362; 493 F.2d at 1150. See *Shushan* v. *United States*, 117 F.2d at 115.

Court rejected the government's attempt to broaden the scope of the mail fraud statute, noting that:

> Congress enacted § 1341 forbidding and making criminal any use of the mails "for the purpose of executing [a] scheme" to defraud or to obtain money by false representations—*leaving generally the matter of what conduct may constitute such a scheme for determination under other laws.*

Id. at 389 (emphasis added). In *Parr*, it was clear that petitioners had violated state laws, leading to state prosecutions for fraudulent conversion. Nevertheless, the Court was still unwilling to extend the mail fraud statute despite the concededly "bad and brazen" behavior of defendants. *Id.* at 393. In the present case, it would be even more inappropriate to extend the application of the mail fraud statute[36] where there was not even arguably a violation of state criminal or civil law.[37]

By relying on breaches of fiduciary duties that do not otherwise exist in state law, the court of appeals in this case has exceeded its authority by creating, in effect, a federal common law of crimes.[38] Only Congress can declare conduct to be criminal. See, *e.g.*, *Viereck* v. *United States*, 318 U.S. 236, 241-42 (1943); *Jerome* v. *United*

[36] In *Parr*, the defendants were school board officials. The individual charged with having violated a fiduciary duty here—Hunt—was not even a public officer.

[37] In this respect, application of the intangible rights doctrine to the nonpublic official Hunt would constitute a more extreme extension of the statute than did *Margiotta*, where the defendant at least had violated state law by his actions. 688 F.2d at 115 n.15.

[38] In so doing, the courts have adopted something akin to "punishment by analogy," a practice once common but now abolished in the Soviet Union, where courts were given free rein to punish acts otherwise not criminal by analogizing them to other crimes. J. Hazard & I. Shapiro, *The Soviet Legal System* I-133 (1962). This Court has rejected such extra-legislative criminalization as "not compatible with our constitutional system." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 168-69 (1972).

States, 318 U.S. 101, 104-05 (1943); *Parratt* v. *Taylor*, 451 U.S. 527, 531 (1981). Nevertheless, the court below, by using a "control over public officials" test, which has never been applied to a private citizen in Kentucky to create a duty to the public, has held that the mail fraud statute itself creates "intangible rights" and concomitant fiduciary duties upon individuals in their capacity as citizens of a particular state. Under this theory, federal courts are empowered to devise and define new state rights and obligations under the guise of construing the federal mail fraud statute. Nothing in Section 1341 authorizes such extraordinary judicial activity.

At a minimum, the Court must hold that when the government's theory of fraud is based on a duty to disclose material information, the fiduciary duties, which serve as the basis for a mail fraud conviction, must preexist independently and clearly under state law or contract. If no such clear duties exist, then creation of those duties by judicial fiat is wholly impermissible.

2. As petitioner explained previously, the extension of 18 U.S.C. § 1341 beyond injuries to property raises a serious federalism issue.[39] But when the Act is further extended to cover fiduciary duties imposed for the purpose of providing an "honest" state and local government,[40] then the federal intrusion into matters of strictly

[39] For the reasons previously stated, the extension of the mail fraud statute beyond injury to property conflicts with the rule of lenity. A further extension of Section 1341 to cover breaches of duties created by federal prosecutors and courts does absolute violence to that rule. Section 1341 does not unambiguously prohibit the patronage arrangement implemented by Hunt and petitioners.

[40] Several of the courts of appeals that have embraced the "intangible rights" doctrine urged by the government here have done so explicitly to permit federal prosecutors to combat perceived state and local official corruption. *See, e.g., United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). See note 37, *supra*.

local concern is extraordinary and cannot be justified without a completely unambiguous congressional statement of intent.

The theory urged by the government permits federal prosecutors to dictate to the states how they should conduct their political affairs. This case illustrates how the federal government can and will interfere with legitimate state prerogatives. Here the Commonwealth of Kentucky has chosen to conduct its business of government through a patronage system in a way that differs from that preferred by at least one federal prosecutor. It defies common sense to think that Congress would intend the general antifraud language of the mail fraud statute to be used by federal officials to prohibit a state from allowing the splitting of insurance commissions in order to further political interests.[41] Yet, that is what the government's theory permits.[42]

[41] The dubiousness of assuming that Congress intended to interfere with Kentucky's insurance commission arrangement is underscored by the important role patronage systems have played and do play in our polity. "Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society. Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis." *Elrod* v. *Burns*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting).

[42] The inherent problem with an intangible rights theory that is not based on some clear statutory or contractual duty is that it would permit the federal government to second-guess, in the guise of a criminal prosecution, all political appointments by state and local officials. If anyone politically powerful owes a duty to the public to conduct his affairs "impartially," then every patronage appointment becomes a potential mail fraud. There is no question that some political appointments are made with party interests rather than the public interest being uppermost in the mind of the person making or "controlling" the appointment. There is no logical reason why such an appointment does not breach a "fiduciary duty" to the public just as much as a decision concerning which insurance agencies should share insurance commissions for political reasons.

Punishment for failure of a political party leader to act honestly and impartially [43] is best left to the citizens and government of the state. An unbridled license to federal prosecutors to pursue perceived political corruption in the states would not only discourage states from internal reform, but also would create a risk that federal prosecutors will pursue only those persons whose political views are contrary to those of the United States Attorney. As Judge Winter recognized in his powerful dissent in *Margiotta*, "use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes." 688 F.2d at 139 (Winter, J., dissenting). The potential chilling effect on free speech and political association engendered by the "intangible rights" doctrine argues forcefully against its adoption under any circumstances. Where, as here, there is not a shred of evidence that Congress intended to intrude upon state authority, the statute should be given a more limited construction.[44]

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[43] Comments, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism*, 28 Am. Univ. L. Rev. 73-74 (1978).

[44] If a party leader were required to act as a "disinterested fiduciary" for the entire electorate, party loyalists would be denied the right of political advocacy. Such an interference abridges the right of political association guaranteed under the First Amendment. As the Court has recognized, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

Furthermore, requiring a party leader to be "unbiased" and represent not just his own party's interests but the interests of other parties and political opponents as well, in a non-partisan manner, places a constitutionally questionable restriction on the content of political speech.

As petitioner pointed out above, courts must construe all statutes in a way that avoids a serious constitutional question. *See* p. 26 n.31, *supra*. See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

In sum, a "scheme to defraud" within the meaning of 18 U.S.C. § 1341, when extended to breaches of alleged fiduciary duties, requires at least proof that a defendant breached a clearly defined state law or contractual duty to disclose material facts which caused injury. The government made no effort to demonstrate that there was any such state law, contractual duty or even state ethical code establishing that a party leader, such as Hunt, was obliged to disclose the existence of the insurance commission splitting arrangement or his participation in it. Accordingly, petitioner's conviction based on the government's theory of a breach of a nonexistent fiduciary duty cannot stand.

II. WHERE THE TRIAL COURT SUBMITS ALTERNATIVE OBJECTS OF A CONSPIRACY TO THE JURY IN A PROSECUTION UNDER 18 U.S.C. § 371 AND THE VERDICT RETURNED IS A GENERAL ONE, THE APPELLATE COURT MUST CONSIDER THE SUFFICIENCY OF THE EVIDENCE ON BOTH OBJECTS BEFORE AFFIRMING THE CONVICTION.

The ruling of the court of appeals that it was unnecessary to consider the sufficiency of the evidence as to the *Klein* theory on the conspiracy count conflicts with the principles enunciated by this Court in *Yates* v. *United States*, 354 U.S. 298 (1957). *Yates* strongly indicates that when the conspiracy charged is based on two or more alternative objects of a conspiracy and when there is a failure of proof as to one of those objects, a general verdict cannot stand. Accordingly, courts of appeals must consider the sufficiency of the evidence as to each alleged object of the conspiracy. Because the court below failed to consider the sufficiency of the evidence to support the object of the conspiracy based on the so-

called "*Klein* theory,"[45] this case should be remanded for such a determination.

Count 1 of the indictment charged that the defendants conspired to (a) defraud the citizens of Kentucky of their right to honest state government (the "intangible rights" theory) and (b) defraud the United States by impeding the lawful functioning of the Internal Revenue Service (the "*Klein*" theory). The district court instructed the jury that a conviction could be based upon either of the objectives of the conspiracy. C.A. App. 1335-36. The jury returned a general verdict, thereby giving no indication whether the jury unanimously agreed upon the first objective, the second objective or perhaps both.[46]

On appeal, petitioners raised substantial questions concerning the sufficiency of the government's evidence in support of the *Klein* theory of conspiracy. Petitioners

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[45] The "*Klein*" tax objective for a conspiracy prosecution originated in *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), where the court held that various acts of concealment of income were sufficient to establish a conspiracy to impede and obstruct the Internal Revenue Service in violation of 18 U.S.C. § 371.

[46] In its opposition to the petition for a writ of certiorari, the government stated that "the fact that the jury convicted petitioners on the substantive mail fraud count makes it almost inescapable that the jury based its verdict at least in part on the mail fraud objective of the conspiracy." U.S. Br. in Opp. 8. Such conjecture ignores the important distinction between a substantive mail fraud count and a conspiracy count—unlike the former, the latter requires that the jury find an agreement between two or more persons to accomplish the criminal objective. It would be incorrect as a matter of law to assume that the jury must have agreed on objective (a) simply because the jury found that petitioners committed a substantive violation of the mail fraud statute. *See United States* v. *Dansker*, 537 F.2d 40, 51 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) ("Hence, it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged.").

showed that the evidence proved that the relevant income tax returns reported all commissions paid to McNally, Alan Hunt and Seton Investments, Inc. The government could not and did not argue that any of the shared commissions were not reported to the Internal Revenue Service. Nevertheless, the court of appeals refused even to consider whether the evidence was insufficient as a matter of law to support a jury verdict based on the *Klein* tax objective.[47] The court rejected petitioners' contention in a footnote, stating:

> Because the government had demonstrated beyond a reasonable doubt that the defendants engaged in a conspiracy with the purpose of depriving the citizens of their intangible rights, it is not now necessary to consider defendants' contention that the evidence was insufficient to support a conviction based on the tax objectives alleged in the indictment.

Pet. App. 11a n.2. This holding is manifestly inconsistent with this Court's prior holdings.

In *Yates* v. *United States*, 354 U.S. 298 (1957), the Court was faced with a challenge to convictions under § 3 of the Smith Act and the federal conspiracy statute, 18 U.S.C. § 371. The Court held that the trial court erred in permitting the jury to consider whether the defendants had "organized" a group dedicated to overthrowing the United States government. The conspiracy charged had two objects, one was the advocacy of violent overthrow, and the other was organizing the Communist Party. The jury returned a general verdict. Accordingly, this Court was unable to determine whether the jury had convicted defendants based on an overt act in furtherance of the organizing objective, rather than the

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[47] If petitioner is correct that his actions did not violate the mail fraud statute, then the Court need not address this issue because the conspiracy count will be fatally flawed since it depended in part on conspiracy to commit mail fraud. *See* U.S. Br. in Opp. 7 n.5.

advocacy objective. Faced with such a general verdict on the conspiracy count, the Court held:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

354 U.S. at 312 (Citations omitted).

The government attempts to dismiss the rule in *Yates* by drawing a distinction between the situation there, where one of several objects "suffers from a legal flaw and therefore fails to state an offense," and the situation here, where "defendants' claim is simply one of evidentiary insufficiency." U.S. Br. in Opp., p. 7 n.5. This distinction is fundamentally unsound. The reasoning of *Yates* applies with equal power to both cases—if the jury *could* have convicted based on a legally unsupportable theory, the conviction must be overturned. It is simply not relevant whether the theory was unsupportable because it was based upon an erroneous interpretation of the statute or whether it was unsupportable because as a matter of law there was insufficient evidence. In both cases, the task of the reviewing court is the same: to determine if any of the theories charged or acts submitted was unsupportable as a matter of law.[48]

This Court has recognized that there is no significant distinction between legal error and evidentiary insufficiency with respect to alternative theories or acts in a criminal case. In stating the rule in *Yates*, the Court relied upon its earlier decision in *Cramer* v. *United*

[48] The distinction urged by the government assumes erroneously that evidentiary insufficiency is somehow a less serious problem than legal error in a jury instruction. However, as this Court made clear in *Jackson* v. *Virginia*, 443 U.S. 307 (1979), evidentiary sufficiency is an essential element of the due process guarantees of the Fifth and Fourteenth Amendments.

States, 325 U.S. 1 (1945). *Cramer* involved a challenge to the defendant's conviction for treason, which like conspiracy requires proof of an overt act. The trial court had submitted the case to the jury on three overt acts which the government contended were sufficient to prove that Cramer had given aid and comfort to the enemy within the meaning of the Constitution. The Court reversed the conviction on the basis that two of the three overt acts provided insufficient evidence that defendant had committed treason. 325 U.S. at 39-40. In so doing, the Court outlined its reasoning:

> The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted were insufficient.

Id. at 36 n.45 (Citations omitted). Like the alternative theories of conspiracy in the present case, any of the three overt acts charged in *Cramer* could have been the sole foundation for the jury's verdict. However, contrary to the rule the government has urged, the Court in *Cramer* found it unnecessary even to consider whether the third overt act charged provided sufficient evidence to support the finding of guilt.

Several courts of appeals have applied similar reasoning to cases involving failure of proof in conspiracy or multiple act cases. *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3rd Cir. 1977); *United States* v. *Berardi*, 675 F.2d 894, 902 (7th Cir. 1982); and *United States* v. *Talkington*, 589 F.2d 415, 417-18 (9th Cir. 1979). As the court explained in *Tarnopol*, when the jury is instructed that any one of several conspiratorial objects is sufficient to find the defendant guilty, and the jury returns a general verdict, "it is impossible to determine whether or not the jury based its verdict upon less than all three of these activities and, if so, upon which ones

the verdict was founded." 561 F.2d at 474. Therefore, the reviewing court must examine the legal soundness of each theory of conspiracy and the sufficiency of the evidence as to each conspiratorial object in order to determine whether the general verdict should stand. *Id.*

The government relies (U.S. Br. in Opp. 6-7) on *Turner* v. *United States*, 396 U.S. 398 (1970), to support its contention that an appellate court need not examine the sufficiency of the evidence as to each alternative object of a conspiracy. However, *Turner* was not a conviction for conspiracy. Rather, *Turner* involved a constitutional challenge to jury instructions based on a statutory presumption that possession of a narcotic drug without revenue stamps is prima facie evidence of a criminal violation.[49] It was in the context of affirming the validity of this statutory presumption as applied to petitioner's possession of 275 glassine bags of heroin without revenue stamps that the Court made the statement quoted by the government.[50] In so stating, the Court did not indicate any intention to overrule *Cramer*. In short, *Turner* involved a very different factual and procedural situation from that presented by petitioner's case, and the dicta in that case is not controlling here.

Petitioner Gray urges this Court to adhere to the principles set forth in *Yates* and *Cramer* and to reject the government's attempt to draw an artificial and constitutionally invalid distinction between conspiracy cases involving an alternative theory which is not supported by sufficient evidence, and cases involving an alternative

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[49] The subsection there prohibited purchasing, selling, dispensing, or distributing narcotic drugs except in or from a stamped package.

[50] U.S. Br. in Opp. 6-7: "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." Quoting *Turner* v. *United States*, 396 U.S. at 420 (footnote omitted).

theory which is legally flawed. The sounder and wiser course is to recognize that the reviewing court must examine the legal validity of each conspiratorial theory presented to the jury *and* the legal sufficiency of the evidence presented to support each alternative theory. Only by adopting this rule can the Court guard against a defendant being convicted of conspiracy on a theory for which there was legally insufficient evidence.[51] In this way the Court gives substance to the Fifth Amendment's guarantee that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." *Jackson* v. *Virginia*, 443 U.S. 307, 316 (1979).

Because the court below refused to examine the sufficiency of the evidence on the *Klein* theory of conspiracy, this Court should remand the case for such an examination, if it declines to reverse petitioner Gray's conviction for mail fraud.

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[51] Under the government's theory, the United States could charge a defendant with multiple objects of a conspiracy, deliberately decline to present any evidence concerning any object except for one and nevertheless insist that the jury be instructed concerning all objects listed in the indictment. There is no justification in logic or policy for such a procedure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 2, 1987

RESPONDENT'S

BRIEF

(3) (5)

Nos. 86-234 and 86-286

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES J. MCNALLY, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES E. GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of violating the federal mail fraud statute, 18 U.S.C. 1341, where the jury was instructed that it could only convict if it found that petitioners had devised a scheme for the dual purposes of (1) defrauding the state and citizens of Kentucky of their right to have the government's business conducted honestly, and (2) obtaining money and property by means of false representations, and the evidence was sufficient to sustain convictions with regard to each purpose independently.

2. Whether the court of appeals properly affirmed petitioners' convictions for violating the federal conspiracy statute, 18 U.S.C. 371, after finding that the evidence showed that petitioners conspired to attain at least one of the two objectives of the conspiracy alleged in the indictment.

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OCTOBER TERM, 1986

No. 86-234

CHARLES J. McNALLY, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 790 F.2d 1290.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on May 12, 1986, and a petition for rehearing was denied on June 27, 1986 (Pet. App. 20a). The

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[1] "Pet. App." references are to the appendix to the petition for a writ of certiorari in No. 86-286.

petition for a writ of certiorari in No. 86-234 was filed on August 13, 1986, and the petition for a writ of certiorari in No. 86-286 was filed on August 22, 1986. The petitions for a writ of certiorari were granted on December 8, 1986, limited to two questions, and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 371 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
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> • • • • •

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated, or held out to be such counterfeit or spurious article, for the purposes of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners Gray and McNally were each convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and on one count of conspiracy to commit mail fraud and to defraud the United States by impeding the Internal Revenue Service's collection of taxes, in violation of 18 U.S.C. 371. Petitioners were sentenced under 18 U.S.C. 4205(c) for a study prescribed in Section 4205(d). The Section 4205(d) studies were postponed pending appeal, and petitioners are currently free on bond.

1. After Democrat Julian Carroll was elected Governor of Kentucky in 1974, Howard P. "Sonny" Hunt was chosen to be chairman of the state Democratic Party (Pet. App. 2a). Among the duties that the Governor assigned to Hunt was the selection of insurance agents from whom the state's insurance contracts would be purchased, a matter normally the responsibility of the state insurance commissioner. Governor Carroll told the insurance commissioner that Hunt would make those decisions, and the commissioner followed Hunt's instructions. 2 C.A. App. 323-330.[2]

In the Spring of 1975, Hunt agreed with representatives of the Wombwell Insurance Agency that, in return for $50,000 per year, Wombwell would continue to be the general agent for the state's workmen's compensation insurance policy. Hunt thus decided that Wombwell would serve as general agent for the fiscal year starting July 1, 1975, and subsequently for each of the next three years as well. 1 C.A. App. 222-223; 2 C.A. App. 529-532; 3 C.A. App. 563-565. Wombwell contracted each year with either the United States Fire Insurance Company or the Hartford Insurance Company to write the state's

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[2] "C.A. App." references are to the joint appendix in the court of appeals.

workmen's compensation insurance policy, and initially received a commission of approximately five percent of the premiums that the state paid for workmen's compensation insurance. 3 C.A. App. 563-565. Pursuant to its agreement with Hunt, however, after it received the commissions Wombwell paid to insurance agencies designated by Hunt the commissions in excess of $50,000 per year. During the four-year period, Wombwell distributed $851,000 in excess commissions in this manner. Pet. App. 3a.

Petitioner James E. Gray served as Kentucky's Secretary of Public Protection and Regulation from January 1976 to May 1978, and also was Secretary of the Governor's Cabinet from January 1977 to August 1979 (Pet. App. 4a). Hunt and Gray devised a scheme utilizing a shell corporation posing as an insurance agency to obtain for their own use some of the excess commissions distributed by Wombwell at Hunt's direction. In 1975, they arranged for the incorporation of Seton Investments, Inc., which had no office, no telephone, and no employees, and engaged in no business activity (4 C.A. App. 934-935). Between 1975 and 1979, Hunt directed Wombwell to distribute $200,000 to Seton, which was used: (1) to purchase a condominium in Lexington, Kentucky, that was used primarily by Gray and his girlfriend; (2) to purchase a condominium in Juno Beach, Florida, that was used primarily by Hunt and his girlfriend; (3) to purchase a station wagon that was used primarily by Hunt and his girlfriend; and (4) to provide $38,500 to Hunt's son. Pet. App. 3a-4a.

As part of the scheme, Hunt and Gray kept secret and took steps to conceal their ownership of Seton and the fact that it was not a bona fide insurance agency. Had Wombwell known that it was splitting commissions with Gray and Hunt, it would have been violating the state's bribery and kickback statutes. Ky. Rev. Stat. Ann. §§ 521.020(b) and 45.990(5) (Michie/Bobbs-Merrill 1985 & 1986). Moreover, Kentucky law authorizes the splitting of commissions only among bona fide insurance

agencies. Ky. Rev. Stat. Ann. §§ 304.9-100, 304.9-420 (Michie/Bobbs-Merrill 1981).

Petitioner Charles J. McNally, a businessman and a supporter of Governor Carroll, aided Hunt and Gray in their scheme by serving as the nominal owner of Seton. Hunt directed Wombwell to distribute $77,500 in excess commissions to the Snodgrass Insurance Agency, which in turn passed the money on to McNally. Pet. App. 3a-4a.[3]

Hunt pleaded guilty to one count of mail fraud and one count of tax fraud for his part in the scheme, and was sentenced to three years' imprisonment. *United States* v. *Hunt*, Cr. No. 81-8-S (E.D. Ky.).[4] Petitioners were charged with one count of conspiracy and seven counts of mail fraud, six of which were dismissed before trial.[5] The single remaining mail fraud count involved an excess commission check mailed by Hartford to Wombwell (1 C.A. App. 64-65), and alleged that the defendants had devised a scheme (1) to defraud the citizens of Kentucky of their right to honest government

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[3] It appears that Hunt initially gave McNally a share of the excess commissions simply to reward him for his support of Governor Carroll. It was unlawful for McNally to share the commissions because he was not a bona fide insurance agent. Ky. Rev. Stat. Ann. §§ 304.9-100, 304.9-420 (Michie/Bobbs-Merrill 1981). After the Federal Bureau of Investigation began an inquiry into Hunt's activities in April 1978, however, Hunt and Gray had McNally sign backdated documents to make it appear that he had always been Seton's owner.

[4] Hunt also served 12 months' imprisonment for civil contempt when he refused to testify before a grand jury after a grant of immunity.

[5] The six counts dismissed alleged Seton's tax returns as mailings in furtherance of the scheme (Pet. App. 6a). The court of appeals affirmed on the ground that mailings required by law to be made can only be viewed as in furtherance of a scheme prohibited by 18 U.S.C. 1341 where the mailed documents are themselves false or fraudulent, and no such allegation was made in the indictment concerning the tax returns (Pet. App. 15a-16a). The government did not file a cross-petition challenging that decision.

and (2) to obtain money and property by fraud.[6] The conspiracy count alleged that the defendants had conspired to violate the mail fraud statute by the scheme set forth in the substantive mail fraud count, and that they had also conspired to defraud the United States by impeding the Internal Revenue Service in the collection of taxes (*id.* at 33-35).

2. The primary issue at trial was whether Gray and Hunt had devised a scheme in order to obtain money and property for themselves. In connection with that issue, much attention was focused on whether McNally was the real owner of Seton, as the defendants contended, or whether he was a front man for the real owners, Gray and Hunt, as the government contended. The government also presented evidence that Seton was not a functioning corporation. 4 C.A. App. 934-935. While the government agreed that McNally became president of Seton in 1978, there was extensive testimony that Gray and Hunt, and not McNally, arranged for the purchase of both of the condominiums Seton purchased (see, *e.g.*, 3 C.A. App. 674-679; 5 C.A. App. 1113-1114) and that Gray and Hunt, and not McNally, used those condominiums (see, *e.g.*, 2 C.A. App. 373; 5 C.A. App. 1116, 1173-1174). Also, the ink used by McNally to sign a number of Seton's corporate documents, which were purportedly signed in 1975 and 1976, was not commercially available until 1978 (4 C.A. App. 1025-1030).

The government also contended that Seton was unlawfully used by Gray and Hunt to avoid taxes. Seton paid taxes on the $200,000 in "commissions" at corporate

[6] The indictment as returned by the grand jury alleged an additional purpose of the mail fraud scheme to defraud the citizens and government of Kentucky of their right to pertinent information in connection with the state's arrangement of workmen's compensation insurance coverage. The district court did not instruct on this purpose, on the ground that it was subsumed within the purpose to deny the right to honest government.

rates of between 20 and 22 percent, while Gray and Hunt would have paid taxes on the money paid to Seton at rates of between 40 and 55 percent. An Internal Revenue Service agent also testified that Seton improperly deducted the $38,500 payment to Hunt's son as a business expense. 4 C.A. App. 934-941.

3. The court instructed the jury that the government had alleged that the defendants had conspired with each other and with Hunt to violate the mail fraud statute and to defraud the United States of tax revenues. The court told the jurors that "you must all agree unanimously on which of the object or objects charged was an agreed purpose of the conspiracy. You may find that the conspirators agreed to achieve both objects, only one of the objects, or neither of the objects, but you must agree unanimously on this finding in order to return a verdict" (5 C.A. App. 1336). The court further instructed that, in order to convict, it had to conclude that the government proved the existence of the alleged conspiracy, that the defendants willfully joined the conspiracy, that they committed at least one overt act charged in the indictment, and that the overt act was committed to conceal some objective of the conspiracy (*id.* at 1338).[7]

[7] The conspiracy instruction provided (5 C.A. App. 1332-1335):

> Count 1 of the Indictment charges the defendants with conspiring to violate the Mail Fraud Act and to defraud the United States Treasury by impeding and impairing the Internal Revenue Service in its lawful functions. In order to convict either defendant on this Count, the United States must prove beyond a reasonable doubt, that the defendants willfully and knowingly devised and intended to devise a scheme or artifice to defraud. If you do not find that the defendants devised and intended to devise a scheme to defraud, then you must find the defendants not guilty on Count 1.
>
> Count 1 of the Indictment charges in part that the defendants devised a scheme and artifice to:
>
> (a) (1) defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials,

and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and,

(2) obtain (directly and indirectly) money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

And for the purpose of executing the aforesaid conspiracy, the defendants, James E. Gray and Charles J. McNally, and Howard P. "Sonny" Hunt, Jr., and others, did place and cause to be placed in a post office or authorized depository for mail matter, matters and things to be sent and delivered by the Postal Service, and did take and receive therefrom such matters and things and did knowingly cause to be delivered by mail according to the direction thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

(b) Defraud the United States by impeding, impairing, and obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States of America in the ascertainment, computation, assessment, and collection of federal taxes.

The essence of this claimed scheme is alleged to be that Howard P. "Sonny" Hunt, Jr., as Chairman of the Central Executive Committee of the Kentucky Democratic Party, though not a state official, had such power over the responsible state officers of the Commonwealth of Kentucky that he was able to control the selection of the insurance agent to write the workmen's compensation policy for the Commonwealth of Kentucky for the years 1975-1979. It is further claimed that because of such power, Mr. Hunt owed a duty to the citizens of the Commonwealth of Kentucky to disclose his agreement with Wombwell Insurance Agency to share its agent's commissions with persons designated by Mr. Hunt to the extent those commissions exceeded $50,000.00 per year, and that this agreement was not disclosed to or known by appropriate state officials.

The defendants herein, Gray and McNally, are further charged with entering into a secret agreement with Mr. Hunt and others to generate, control, and distribute to themselves and others a portion of those commissions, and to accomplish this, in part, by setting up the corporation, Seton Investments, Inc., for the

As to the mail fraud count, the court instructed the jury that, in order to convict, it had to conclude that the defendants devised the scheme, as alleged in the indictment, to defraud the citizens of Kentucky of their right to have the Commonwealth's business and affairs conducted honestly and to obtain money and other things of value by false and fraudulent pretenses, and that they caused the mails to be used for the purpose of executing the scheme (5 C.A. App. 1341-1342).[8] At no time did

purpose of concealing and disguising the receipt of those commissions by Hunt and Gray.

[8] The mail fraud instruction provided (5 C.A. App. 1341-1344):

Count 4 of the Indictment states that the defendants and each of them acted in violation of the Mail Fraud statute. In order to convict either defendant on this count, the United States must prove by the evidence, beyond a reasonable doubt, that the defendants devised and intended to devise a scheme or artifice to defraud. If you do not find that the defendants devised and intended to devise a scheme to defraud then you must find the defendants not guilty on Count 4.

Count 4 of the Indictment charges in part that the defendants devised a scheme or artifice to:

(a) (1) defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and,

(2) obtain (directly and indirectly) money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.

And for the purpose of executing the aforesaid scheme, the defendants, James E. Gray and Charles J. McNally, and Howard P. "Sonny" Hunt, Jr., and others, did place and cause to be placed in a post office or authorized deposit for mail matter, matters and things to be sent and delivered

by the Postal Service, and did take and receive and cause to be taken and received therefrom such matters and things and did knowingly cause to be delivered thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

(b) Defraud the United States by impeding, impairing, and obstructing and defeating the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States of America in the ascertainment, computation, assessment and collection of federal taxes.

To find that the defendants or either of them devised such a scheme you must find beyond a reasonable doubt one of the following:

(1) That Howard P. "Sonny" Hunt, Jr., as Chairman of the Central Executive Committee of the Kentucky Democratic Party, though not a state official, had such power over the responsible officials of the Commonwealth of Kentucky that he was able to control the awarding of the Commonwealth of Kentucky's Workmen's Compensation Contract to the Wombwell Insurance Company for the years 1975 through 1979 and that Howard P. Hunt, Jr., directed commissions from the Commonwealth of Kentucky's Workmen's Compensation Contract to Seton Investments, Inc., an entity in which he had an ownership interest without disclosing that interest to persons in State government whose actions or deliberations could have been affected by the disclosure. You must further find, beyond a reasonable doubt, that the defendants or either of them aided and abetted Mr. Hunt in that scheme; or

(2) That the Commonwealth of Kentucky's Workmen's Compensation Insurance was a matter under the supervisory authority of the defendant Gray as Secretary of Public Protection and Regulation or Secretary of the Governor's Cabinet at the time that Seton Investments, Inc., received commissions from that insurance policy. You must further find beyond a reasonable doubt that defendant Gray had an ownership interest in Seton Investments and that he failed to disclose that interest to persons in State Government whose actions or deliberations could have been affected by such disclosure. To find the defend-

the court instruct, nor did the government argue (see 5 C.A. App. 1241-1313), that the government could prove its case by establishing only one of the two alleged purposes of the scheme to violate the mail fraud statute—*i.e.*, to defraud the citizens of their right to honest government or to obtain money or property by false pretenses.[9]

The jury convicted on both counts.

4. The court of appeals affirmed on both counts (Pet. App. 1a-16a). Dealing first with the mail fraud charge, the court did not focus on the fact that the jury had been instructed to convict on that count only if it found that

ant McNally guilty under this instruction, you must find that he aided and abetted the defendant Gray.

What must be proved, beyond a reasonable doubt, is that the defendants knowingly and willfully devised or intended to devise a scheme to defraud as described in Instruction No. 11; and that the use of the United States mails was closely related to the scheme and an integral part of the scheme in that the defendants either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge either that the use of the mails will follow in the ordinary course of business or to reasonably foresee that the use of the mails will follow in the ordinary course of business.

In this case, unless you find that the defendants caused the mailing of an envelope containing a commission check No. 1089512, from The Hartford to Wombwell Insurance Agency on or about May 8, 1979, beyond a reasonable doubt, you shall find the defendants not guilty on Count 4.

[9] The court also erroneously instructed the jury that, in order to convict the defendants on the mail fraud count, it had to conclude that they had defrauded the United States by impeding the Internal Revenue Service in the collection of federal taxes, as Gray notes (86-286 Br. 7 n.7). The court of appeals rejected petitioners' contention that they were somehow prejudiced by this instruction, which added to the government's burden, stating that the inclusion of an extra requirement in the instructions to the jury did not impermissibly amend the indictment (Pet. App. 14a).

petitioners had devised a scheme both to defraud the citizens of their right to honest government and to obtain money or property by fraudulent means. It instead analyzed the case as though the fraudulent denial of intangible rights was the only theory upon which the mail fraud convictions could be upheld.

Noting the long line of authority upholding mail fraud convictions involving "schemes to defraud the citizens of the intangible rights to honest and impartial government" (Pet. App. 7a), the court of appeals stated that "the 'intangible rights' theory is anchored upon the defendant's misuse of his public office for personal profit" (Pet. App. 8a). It found it established beyond a reasonable doubt that the awarding of the state's workmen's compensation insurance policy was within Gray's supervisory authority as Secretary of Public Protection and Regulation or as Secretary to the Governor's Cabinet, and that McNally aided and abetted Gray in perpetrating this fraud (Pet. App. 9a). It also found that the evidence clearly showed that Hunt, in his position as Democratic Party Chairman, "exercised significant, if not exclusive, control over awarding the workmen's compensation insurance contract to Wombwell and the payment of monetary kickbacks to Seton" and, accordingly, that he was "a de facto public official who assumed a fiduciary duty to the citizens of Kentucky" (*id.* at 10a-11a).

Having found the evidence sufficient to establish that the defendants had violated the mail fraud statute and had conspired to violate the mail fraud statute, the court of appeals declined to consider whether the evidence was also sufficient to establish that petitioners had conspired to impair the government's ability to collect taxes. The court reasoned that it did not have to do so because the evidence relating to the mail fraud aspect of the conspiracy was sufficient standing alone to support the conspiracy conviction. Pet. App. 11a n.2.

SUMMARY OF ARGUMENT

Petitioners were convicted on one count of violating the federal mail fraud statute, 18 U.S.C. 1341, and on one count of conspiracy to commit mail fraud and tax fraud in violation of 18 U.S.C. 371. The evidence at trial established a scheme utilizing the mails and a complex subterfuge involving a shell corporation, to convert public money to petitioners' use. It also demonstrated that petitioner Gray was a state governmental official and that co-conspirator Hunt, as state party chairman, had been delegated by the Governor control over the awarding of the state's insurance business and over the disposition of excess commissions which that business generated. Upon instructions from Hunt, the insurance agency handling the state's workmen's compensation business sent money derived from premium payments by the state to Seton Investments, which conducted no business, but received and disseminated money for the benefit of the co-conspirators.

I. The jury was instructed that in order to convict on the mail fraud count the government had to prove a scheme with the dual purpose (1) to defraud the state and citizens of Kentucky of their right to the honest performance of the public's business, and (2) to obtain money and property by means of false pretenses. In convicting, the jury therefore necessarily found, and the evidence amply supported, a mail fraud scheme with both objectives.

Petitioners' convictions would have plainly been proper had the government charged and the jury returned a guilty verdict on a scheme directed only at the obtaining of money and property by false pretenses. Because the jury necessarily found such a scheme, the mail fraud conviction must be upheld whether or not petitioners could properly have been convicted solely on the theory that they conspired to deprive the state and its citizens of their right to the honest conduct of public business. Given that posture of the case, the Court need not reach

the intangible rights issue upon which certiorari was granted.

In any event, the government could also properly have charged and proven its case solely on the theory of a scheme to defraud the public of its intangible right to honest government. Nothing in the ordinary or historical meaning of the statute's language, or in its legislative history, suggests that the deprivation of rights toward which a prohibited scheme is directed must involve money or tangible property. While the statute is plainly limited to schemes involving fraud—meaning deception or trickery—the narrowing construction suggested by petitioners is wholly inconsistent with Congress's intended broad prohibition. That is demonstrated by this Court's constructions of the mail fraud statute, its consistent reading of the words "to defraud the United States" as they appear in the conspiracy statute, 18 U.S.C. 371, and by the consistent and repeated decisions of the courts of appeals upholding mail fraud convictions based on schemes to deny intangible rights.

While there may be uncertainty about the nature of the intangible rights that are sufficient to support a mail fraud conviction, the public's right to be free from criminal self-dealing in the exercise of governmental power is clearly in that category. Here, the evidence showed a criminal mail fraud by petitioners in obtaining property by false pretenses. The utilization of governmental power to facilitate the commission of such a crime amounts to a second wrong beyond the fraudulent misappropriation of property, and can be described as the fraudulent misappropriation of governmental authority to pursue illegal, personal ends.

Petitioners' arguments that the government has failed to prove a breach of duty by a public official are demonstrably wrong on the facts of the case. For reasons apparent from the trial court's jury instructions, the jury necessarily found that petitioner Gray, an actual state

official, participated in a fraud against the state, so that the state was denied its right to his honest services. Even assuming that the jury's verdict necessarily rested on Hunt's utilization of governmental power to control the state's insurance business, which authority was given him by the Governor on account of his position as party chairman, his abuse of that authority likewise offended the right of the citizenry to honest public administration. There is no reason to suppose that the duty not to criminally misuse governmental authority is any less for one who derives that power by an informal delegation and without pay, than for one who also draws a salary check.

Petitioners' assertion that federalism concerns militate against federal prosecution based on the intangible right to be free from criminal self-dealing by persons exercising state governmental powers is without merit. Such prosecutions have contributed substantially to the honest and effective functioning of government and have not invaded areas of state policy where reasonable people can differ.

II. Petitioners' convictions on the conspiracy charge should also be affirmed. The jury was instructed that it could convict on that charge if it found a conspiracy either to commit mail fraud or to commit tax fraud. For two reasons, the court of appeals did not err in affirming based only on its finding of sufficient evidence of a conspiracy to commit mail fraud, without considering the evidence of tax fraud.

First, it is clear from the facts of the case—most obviously from the jury's conviction on the substantive mail fraud charge—that it must have found a conspiracy to commit mail fraud. Given the nature of the evidence and the charges, it is impossible to imagine a way in which both petitioners could be guilty of the substantive mail fraud without also conspiring to commit that offense. This case differs from decisions of this Court which have reversed convictions due to a legal defect in one of multiple alternative theories on which a criminal

charge was based. *Yates* v. *United States*, 354 U.S. 298 (1957); *Stromberg* v. *California*, 283 U.S. 359 (1931). Here, there is no legal defect in either the mail fraud or the tax fraud theory of the conspiracy, and, unlike those cases, it is plain that the jury must have found a conspiracy on the theory the court of appeals found sufficient.

Second, even if it were not apparent that the jury in fact found a conspiracy to commit mail fraud, the conviction could be upheld solely on the sufficiency of the evidence to support that theory. The issue for a reviewing court is whether a reasonable jury could have convicted on the evidence before it, and the general rule is that sufficient evidence on one of several alternative means of violating a statute justifies affirmance of the conviction.

ARGUMENT

I. PETITIONERS WERE PROPERLY CONVICTED OF VIOLATING THE MAIL FRAUD STATUTE

The evidence at trial clearly showed a scheme to convert public funds to the benefit of Hunt, Gray, and McNally, by a complex subterfuge involving a shell corporation and misfeasance by Gray, performing in an undisputedly governmental position, and by Hunt, who, as party chairman, had the power to determine who would receive the state's insurance business. The indictment charged, the government undertook to prove, and the court instructed that in order to convict the jury must find that petitioners devised a scheme to defraud aimed both at depriving the state and citizens of their intangible right to honest service by those carrying governmental responsibilities *and* at obtaining money or other things of value. The jury's guilty verdict on the mail fraud charge indicates its unequivocal conclusion that a scheme pursuing both of these objectives was in fact proven. Since the government need only have alleged and proven a single legally sufficient objective of the scheme, the mail fraud conviction must be upheld if either the

denial of intangible rights or the obtaining of money or property objective offers a sound predicate for a mail fraud violation and was proven by sufficient evidence.[10]

A. The Intangible Rights Issue Upon Which Certiorari Was Granted Need Not Be Reached, Since The Mail Fraud Conviction Must Be Affirmed However That Issue Is Resolved

The primary elements of the mail fraud statute, as presently constituted, were enacted by separate acts of Congress. The first clause, which prohibits "any scheme or artifice to defraud," derives from the original mail fraud statute enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The third clause, which prohibits schemes to use the mails to distribute counterfeit money, was added in 1889. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873. The second clause, which prohibits "any scheme • • • for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," was added in 1909. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. See Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 779-821 (1980).[11]

In addition to the fact that each clause was added to the statute at a different time, they are separated by the disinjuntive "or." This Court has stated, reflecting common English usage, that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings." *Reiter* v. *Sonotone*, 442 U.S. 330, 339 (1979). This Court concluded under a predeces-

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[10] No question is presented concerning whether the government established the requisite connection with the use of the mails here, an issue that the Court considered in *United States* v. *Maze*, 414 U.S. 395 (1974), and *Parr* v. *United States*, 363 U.S. 370 (1960).

[11] The language of the statute as it existed in 1872 is reprinted in Rakoff's article at 783; the language of the statute following the 1889 amendment is reprinted in the article at 809; and the language of the statute following the 1909 amendment is reprinted in the article at 816 n.206.

sor statute that an indictment that charged a scheme to sell counterfeit money, a violation of what is now the third clause, did not have to include a charge that the defendant devised a scheme "to defraud," a violation of the first clause, because the statutory prohibitions were listed separately and applied to different conduct. *Streep* v. *United States*, 160 U.S. 128, 132-133 (1895). It is thus plainly sufficient to allege and prove acts falling under any one of the three clauses, and it is not necessary to show that particular conduct comes within all three clauses.[12] No court has held otherwise.

Notwithstanding that it need not have done so in order to convict, the government alleged and proved that the defendants violated both the first and the second clauses of the statute—that they devised a scheme (1) to defraud the citizens of Kentucky of their intangible right to honest government, in violation of the first clause, and (2) to obtain money and property by fraud, in violation of the second clause. Pet. App. 5a. More importantly, the jury was instructed that, to find the defendants guilty, it had to find beyond a reasonable doubt that a scheme was devised to pursue both objectives. Note 8, *supra*.

Petitioners do not acknowledge that they were charged and convicted under two separate clauses of the mail fraud statute. They instead attack only the allegation that they violated the intangible rights of the citizens of Kentucky.[13] In fact, however, the jury was also instructed that it must find a scheme for obtaining money

[12] See *United States* v. *Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974).

[13] Citing the jury instructions, Gray states that "[t]he sole basis for petitioners' prosecution under the mail fraud statute is the mere allegation that the petitioners 'defrauded' the citizens of Kentucky of 'their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonestly, official misconduct, and fraud • • • C.A. App. 1341.'" (86-286 Br. 30).

by false or fraudulent pretenses in order to convict and the evidence of a scheme for that purpose—quite apart from the fraudulent denial of intangible rights—is overwhelming. The mail fraud conviction must therefore be affirmed, whether or not it could be sustained if the only allegation were a denial of intangible rights.

Indeed, it is clear that the primary objective of the scheme was to obtain money and other property for petitioners and Hunt by deceit and trickery. McNally received $77,500, which was channelled to him through the Snodgrass Insurance Agency. Pet. App. 4a. While Gray disputed at trial that he obtained any property through the scheme, contending that it was McNally who owned Seton, the evidence clearly showed that it was Hunt and Gray, not McNally, who controlled Seton and received the beneficial use of the condominiums in Lexington, Kentucky, and Juno Beach, Florida, and the 1976 Ford Country Squire station wagon, all purchased with excess commissions received by Seton from Wombwell. *Ibid.*[14]

This money and property was received "by means of false or fraudulent pretenses, representations, or promises." The creation of Seton by Hunt and Gray in 1975, its use as a shell corporation posing as a bona fide insurance agency, solely for the purpose of receiving excess commissions directed to it by Hunt, and the involvement of McNally as a front man to direct attention away from Gray and Hunt, makes this clear.[15] Kentucky law pro-

[14] Notwithstanding Gray's repeated contention before this Court that he "received nothing of value as a result of the splitting of insurance commissions" (86-286 Br. 16 n.13), the evidence clearly showed that Gray's girlfriend lived in the condominium in Kentucky at a rent far below its market value and that Gray had a key to that condominium and visited her there two or three times a week. It also showed that Gray and his girlfriend visited the Florida condominium on occasion. 2 C.A. App. 373; 5 C.A. App. 1116, 1173-1174.

[15] Even if petitioners' conduct is characterized as concealment of Seton's true nature rather than false representations as to

vided at that time that "[n]o agent or solicitor shall directly or indirectly share his commission • • • with any person not also licensed as agent or solicitor" (Ky. Rev. Stat. Ann. § 304.9-420 ((Michie/Bobbs-Merrill 1981) (repealed 1984)),[16] and further that licenses are not properly issued solely for the purpose of receiving "a rebate or premium in the form of 'commission'" (*id.* § 304.9-100). Neither Gray nor Hunt were licensed insurance agents, and Seton transacted no insurance business.[17]

Seton's purposes and ownership, petitioners are equally liable under the second clause of the mail fraud statute, since the courts have concluded without exception that concealment of relevant facts violates the statute. See, *e.g.*, *United States* v. *O'Malley*, 707 F.2d 1240, 1247 (11th Cir. 1983); *United States* v. *Allen*, 554 F.2d 398, 410-411 (10th Cir.), cert. denied, 434 U.S. 836 (1977); *United States* v. *Bush*, 522 F.2d 641, 651 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976).

[16] Although Section 304.9-420 was repealed in 1984, it was replaced by Ky. Rev. Stat. Ann. § 304.9-421 Michie/Bobbs-Merrill Supp. 1986, entitled "[s]haring of commissions prohibited," which, as its title suggests, continues the prohibition against the sharing of commissions with persons who are not bona fide insurance agents.

Gray states (86-286 Br. 14 n.9) that Insurance Commissioner McGuffey advised Wombwell that "it was legal to share insurance commissions with a licensed officer of an unlicensed agency." That misstates the facts. McGuffey's one-sentence letter stated in full: "It is legal to share commissions with an insurance corporation in which the officers are licensed insurance agents." 6 C.A. App. 1393. Nothing in that sentence supports any contention that it is permissible to establish a sham insurance agency to share commissions. Nor does the letter's reference to "licensed insurance agents" mean, as Gray suggests, contrary to Ky. Rev. Stat. Ann. § 304.9-100 Michie/Bobbs-Merrill 1981, that the officers of a corporation may obtain insurance licenses in order to share commissions even though they are not actually involved in the insurance business.

[17] Hunt testified that Wombell's vice-president repeatedly asked for assurance that Hunt was directing it to split commissions only with other insurance agencies. 1 C.A. App. 232. Hunt never informed him that Seton was not a bona fide agency, notwithstanding that it did no business. Instead, he provided Wombwell with the

It is no objection to the affirmance of the mail fraud convictions as a scheme for obtaining money or property by false pretenses that there must be a corresponding proof of loss to a victim of the scheme (see 86-286 Br. 15-17). Presumably such a loss necessarily is realized by someone when, as here, money is redirected by deception to persons who are not entitled to it. More importantly, however, Gray's contention, which is offered as an objection to the conviction based on deprivation of intangible rights, rests on his view that Congress intended that the phrase "scheme • • • to defraud" be interpreted in light of the common law meaning of the word "fraud" and that at common law proof of loss was required to establish fraud. While we contend that Gray's construction is wrong and that the first clause of Section 1341 prohibits the deprivation of intangible as well as tangible rights (pages 22-28, *infra*), it is even more clearly inapplicable in the context of the second clause of the statute. That clause requires proof that the defendants devised a scheme to obtain money or property by false pretenses, but it does not require proof of loss. If Congress had intended to require proof of a loss, it could have so stated.

There is no other legal objection to affirmance of petitioners' mail fraud convictions on the ground that the jury necessarily and, on the face of the record, properly found a scheme for obtaining money or property by false pretenses. Since the convictions must, in any event, be affirmed on that basis, the question whether they could independently be affirmed solely on a theory of a scheme to defraud involving intangible rights is not pre-

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number of an insurance license issued to McNally (7 Tr. 43-46), a license McNally obtained solely for the purpose of receiving excess commissions (2 C.A. App. 298). Hunt and Gray also concealed their ownership of Seton. Wombwell would have violated the state's bribery and kickback statutes had it directed excess commissions to Seton knowing that it was a front for Hunt and Gray. Ky. Rev. Stat. Ann. §§ 521.010(1)(b), 521.020(a), 521.020(b) (Michie/Bobbs-Merrill 1985).

sented in a way that can possibly control the outcome of the case.

B. Even If The Mail Fraud Conviction Depends Upon Proof Of A Scheme To Defraud The State And Its Citizens Of Their Right To The Honest Performance Of Public Business, It Must Be Affirmed

Should the Court find it appropriate to reach the intangible rights issue, it should find that the mail fraud conviction could properly have been based on that theory alone. As relevant to the issue of intangible rights, the indictment alleged that petitioners devised a scheme or artifice to "defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials and employees of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud." It further set forth at length specific allegations as to defendants' conduct in this case. 1 C.A. App. 33-56. This allegation invokes the first clause of Section 1341, which prohibits the use of the mails in furtherance of "any scheme or artifice to defraud." The issue posed is thus whether the mail fraud statute prohibits schemes to defraud persons of intangible rights or rather prohibits only schemes to obtain money or other concrete items of value. If the mail fraud statute reaches fraudulent schemes to deprive persons of intangible rights, then it must be determined whether sufficient proof of such a scheme was presented here.

1. *The mail fraud statute reaches schemes to defraud, whether the legal rights invaded by the scheme concern identifiable property or are intangible in nature*

In enacting the mail fraud statute, Congress expressed itself through the most inclusive language. It prohibited "any scheme or artifice to defraud." By outlawing *any*

scheme to defraud, Congress demonstrated its intent to broadly prohibit fraud in connection with the mails. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972). While it did impose a requirement of fraudulent conduct, meaning deceit or trickery, and thus did not intend to reach takings by threat or force (*Fasulo* v. *United States*, 272 U.S. 620, 629 (1926); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)), there is no reason to suppose that the statute was intended only to reach schemes affecting property and other tangible rights. On its face and in light of common usage, it appears to prohibit use of the mails in connection with any scheme "to cheat or trick" or "[t]o deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." *Black's Law Dictionary* 381 (5th ed. 1979).

This conclusion is consonant with our best understanding of common language usage closer to the time that the first clause of the statute was enacted. Law dictionaries of the times defined broadly the types of interests subject to deprivation by fraudulent action. One dictionary explained that "[t]o defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice." 1 *Bouvier's Law Dictionary* 530 (1897). The same dictionary defined fraud as involving deceitful practices "endeavoring to defraud another of his known right, * * * contrary to the plain rules of common honesty" (*id.* at 845). Another dictionary agreed, defining "defraud" as "[t]o cheat; to deceive; to deprive of a right by an act of fraud[;] [t]o withhold from another what is justly due him, or to deprive him of a right, by deception or artifice." W. Anderson, *A Dictionary Of Law* 474 (1893).[18]

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[18] Those dictionaries also defined "right" broadly. Anderson defined it (at 904) as "an enforceable claim or title to any subject matter whatever: either to possess and enjoy a tangible thing,

Nothing in the legislative history of the mail fraud statute suggests that it was somehow intended to be limited to schemes affecting tangible interests in money or property. The only legislative history concerning the 1872 enactment of Section 1341's predecessor consists of an 1870 Post Office report suggesting the need to prevent "lottery swindlers" from using the mails (Report of the Postal Committee, Mar. 30, 1870) and a statement by a congressman, also made in 1870, that the statute was aimed at "rapscallions" engaged in "deceiving and fleecing the innocent people in the country" (Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)). In enacting the statute two years later, however, Congress did not enact a narrowly phrased statute, but instead enacted the sweeping prohibition that is presently the statute's first clause. (Rakoff, *supra*, 18 Duq. L. Rev. at 780).

The question quickly arose as to what types of schemes the statute covered. While some courts gave it a narrow construction, limiting its scope to "common schemes" dependent upon the use of the mails (see *United States* v. *Owens*, 17 F. 72, 74 (E.D. Mo. 1883)), others read it broadly. For example, in *United States* v. *Jones*, 10 F. 469 (C.C. S.D.N.Y. 1882), the court held that the "green article" scheme—the use of the mails to send counterfeit money—violated the statute, even though neither the receiver nor the sender of the "green article" was deceived in any way. Congress amended the statute in 1889, adding what is now the third clause of the statute, to make clear that it was to be construed to cover all sorts of schemes involving counterfeit money. Gray contends that "[t]his amendment on its face suggests that the original prohibition against 'any scheme or artifice to defraud' was not expansive in scope" (86-286 Br. 19).

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or to do some act, pursue a course, enjoy a means of happiness, or to be exempt from any cause of annoyance," and acknowledged the existence of "political rights" as well (at 905). Bouvier defined "right" (at 927) simply as "a well-founded claim."

We submit that this action by Congress is better understood as evidencing an intention to assure that the statute be construed broadly. It amended the statute to make clear that the courts that had construed the statute broadly had interpreted it correctly. Rakoff, *supra*, 18 Duq. L. Rev. at 809-810.

The 1909 amendment of the statute further confirms Congress's intent that the mail fraud statute be read as effecting a broad prohibition on fraudulent conduct relying on the mails. The defendants in *Durland* v. *United States*, 161 U.S. 306 (1896), had argued that the meaning of "defraud" must be limited to misrepresentations of "existing fact," excluding those as to future facts or events. The Court rejected that contention (*id.* at 313-314), holding that "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact" (*id.* at 314). Congress codified that result in 1909, as Gray states (86-286 Br. 21) and McNally agrees (86-234 Br. 11-12), and also deleted much of the language requiring a connection between the scheme in question and the use of the mails, evidencing its intent that the statute should be construed to prohibit frauds of all kinds that involve the mails. Rakoff, *supra*, 18 Duq. L. Rev. at 816-817.

Moreover, interpretation of the federal conspiracy statute—which since 1867 has criminalized conspiracies to "defraud the United States"—reflect a concern for intangible interests, apart from any identifiable actual financial or property gain or deprivation. See generally Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 417-420 (1959). In *Haas* v. *Henkel*, 216 U.S. 462, 479-480 (1910), the Court found that "any conspiracy which is calculated to obstruct and impair [the Department of Agriculture's] efficiency and destroy

the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States * * *. [I]t is not essential to charge or prove an actual financial or property loss to make a case under the statute." In *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924), the Court noted that while "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money, * * * it also means to interfere with or obstruct one of its lawful government functions by deceit." See also *United States* v. *Keitel*, 211 U.S. 370, 393-394 (1908); *Hyde* v. *Shine*, 199 U.S. 62, 82 (1905); *Curley* v. *United States*, 130 F. 1, 3 (1st Cir. 1904) (concluding that the prohibition of conspiracies to defraud the United States was broadly designed "for the protection of intangible rights, privileges, and functions of government"). While this interpretation—which was carried forward under 18 U.S.C. 371 (see *United States* v. *Johnson*, 383 U.S. 169, 172 (1966) (citation omitted) (statute encompasses "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government"))—is not dispositive of what Congress meant when it enacted the relevant section of the mail fraud statute in 1872, it does suggest that Congress might have at some time entertained an amendment had it been dissatisfied with the broad reading that its words could be expected to receive.

While this Court has yet to confront the issue of intangible rights under the mail fraud statute, it is hardly surprising that no court of appeals has limited Section 1341 to fraudulent schemes having as their object the deprivation of tangible rights. In general, the courts of appeals have given the phrase "scheme * * * to defraud" a broad but common-sense meaning consistent with Congress's intention in enacting the statute. As the court noted in *United States* v. *States*, 488 F.2d 761, 764 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974), it was long ago decided that "any kind or species of scheme

or artifice to defraud is punishable in the national courts, if and whenever for the purpose of executing that scheme the postal establishment is used" (quoting *Gouled* v. *United States*, 273 F. 506, 508 (2d Cir. 1921)). The courts have necessarily given "defraud" a broad meaning in construing the first clause of Section 1341 since fraud "is as old as falsehood and as versable as human ingenuity" (*Weiss* v. *United States*, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941)). Defining the term too strictly would permit schemers to devise methods of depriving others of their rights by methods calculated to comply with letter of the law.

It follows that at least where a scheme to defraud is directed to the deprivation of an established legal right, the mail fraud statute may properly be invoked. The question of what does, in fact, constitute a legal right is in some instances a difficult one, and poses a limit on the applicability of the statute. But no such marginal case is presented where the rights of the state government and its citizens to be free from venal self-dealing in the performance of the state's businss is concerned. As other courts of appeals have found, some in less clear cases than this one, the right of the state and its citizens to the honest performance of the government's business may, in proper cases, be protected by the sanction of the mail fraud statute. See, *e.g.*, *United States* v. *Silvano*, No. 86-1460 (1st Cir. Mar. 4, 1987), slip op. 9-12; *United States* v. *Lovett*, No. 85-2967 (7th Cir. Jan. 26, 1987), slip op. 8-13; *United States* v. *Mandel*, 591 F.2d 1347, 1357-1364, aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Isaacs*, 493 F.2d 1124, 1149 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F.2d 761, 763-767 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *Edwards*, 458 F.2d 875, 880-881 (5th Cir.), cert. denied, 409 U.S. 891 (1972); *Bradford* v. *United States*, 129 F.2d 274, 276 (5th Cir.), cert. denied, 317 U.S. 683

(1942); *Shusan* v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941).[19]

In *Shusan*, the Fifth Circuit held that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. • • • No trustee has more sacred duties than a public official and any scheme to obtain an [unfair] advantage by corrupting such an one must in the federal law be considered a scheme to defraud" (117 F.2d at 115). Indeed, the Fourth Circuit stated eight years ago that "[a]t this late date, there can be no real contention that many schemes to defraud a state and its citizens of intangible rights, *e.g.*, honest and faithful government, may not fall within the purview of the mail fraud statute." *Mandel*, *supra*, 591 F.2d at 1362.

2. *Petitioners' conduct here was properly punishable under the mail fraud statute on the ground that they devised a scheme to defraud the State and its citizens of their right to have the public's business conducted in an honest manner*

There can be no serious argument that the scheme devised and carried out by petitioners in this case was calculated to and did in fact utilize trickery and deception to deny the Commonwealth of Kentucky and its citi-

[19] See also *United States* v. *Bruno*, 809 F.2d 1097, 1104-1105 (5th Cir. 1987), in which the court held that the federal wire fraud statute, 18 U.S.C. 1343, prohibits schemes to deprive citizens of the intangible right to honest government. ("Of course, no one contests that the citizens of Orleans Parish possess the right to honest services of its public officials." (*id.* at 1105).)

The courts of appeals have also held that non-governmental employees may defraud their employers of intangible rights to honest and loyal service in violation of Section 1341 by failing to disclose material information to the employer in breach of fiduciary duties owed the employer. See, *e.g.*, *United States* v. *Alexander*, 741 F.2d 962 (7th Cir. 1984); *United States* v. *von Barta*, 635 F.2d 999, 1005-1006 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981).

zens of a basic legal right to have its business conducted in an honest manner. While it may not always be obvious whether the object to be denied by a scheme is fairly termed a legal right,[20] surely a state and its citizens have such a right to demand that those carrying out public responsibilities not use the power entrusted to them to line their pockets with public funds. As demonstrated in part A, leaving aside the issues of precisely what was charged in this case, the government clearly proved that petitioners engaged in a scheme to obtain money by false pretenses. When coupled with a mailing in furtherance of the scheme, such conduct is plainly a federal crime, quite apart from any reliance on an intangible right to honest government. The utilization of governmental authority and power to facilitate the commission of such a crime amounts to a second wrong beyond the fraudulent misappropriation of property and may be described as the fraudulent misappropriation of governmental authority to pursue illegal ends.

Petitioners offer several arguments contesting this conclusion in categorical terms. Petitioner Gray first asserts (86-286 Br. 15-17) that the term "defraud" must be construed to require proof of financial loss to a victim, on the ground that such a loss is required under the common law meaning of the term. Gray is quite vague about the supposed common law basis for this claimed interpretation, and we submit that the best authority points in a distinctly different direction. See pages 23-24, *supra*. Moreover, this Court has indicated that it is doubtful whether "defraud" conveys "a common-law meaning, and that that meaning would be impelled if the word stood alone in the statute." *Keitel*, 211 U.S. at 393. In any event, since the Court in *Durland* rejected a nar-

[20] It appears reasonable, however, that a scheme formed with the specific intent to deny the proper performance of an enforceable fiduciary duty would meet such a test. See *United States* v. *Barta*, 635 F.2d 999, 1005-1006 (2d Cir. 1980).

rowing construction of the mail fraud statute based on an asserted common law meaning of the term "fraud" (161 U.S. at 313-314; *Mandel*, 591 F.2d at 1361; Rakoff, *supra*, 18 Duq. L. Rev. at 811-812), arguments of this sort have carried little weight in the context of this statute.[21]

Gray also argues (86-286 Br. 25-28) that the rule of lenity requires that the statute not be interpreted to prohibit violations of intangible rights. However, while "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (*United States* v. *Culbert*, 435 U.S. 371, 379 (1978) (citation omitted); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)), that rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callahan* v. *United States*, 364 U.S. 587, 596 (1961). Where no ambiguity exists, lenity is not relevant. *Culbert*, 435 U.S. at 379. The rule of lenity has no operation here. Congress has spoken in broad terms which the courts of appeals have uniformly and reasonably found to proscribe schemes to defraud having as their objective the deprivation of both tangible and intangible rights.

Nor is there any merit to petitioners' contentions that they were not properly convicted because Hunt did not hold public office but was instead a de facto public official as defined in *United States* v. *Margiotta*, 688 F.2d 108, 121-126 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983). First, on the record from the trial court, the question whether a person who does not hold public office

[21] Gray also contends (86-286 Br. 16) that the first clause of the statute should be construed to require proof of financial loss to a victim because the second clause of the statute makes reference to "obtaining money or property." We submit that the clauses should be read separately (see pages 17-18, *supra*), and, in any event, the second clause plainly does not itself require proof of loss to a victim.

can be convicted under the mail fraud statute as a de facto public official without proof that he schemed with an actual public official is not presented here. No one disputes that "[o]nly one member of the conspiracy need be a public fiduciary to support an intangible rights mail fraud indictment against all members of the conspiracy" (Pet. App. 8a). It is also settled that Gray was a public official with fiduciary duties to the citizens of Kentucky and that the awarding of the state's "workmen's compensation insurance policy was within Gray's supervisory authority as Secretary of Public Protection and Regulation or as Secretary to the Governor's Cabinet" (*id.* at 9a). And the jury was instructed that it could convict the defendants on the mail fraud count if it found that Gray had violated the intangible rights of the citizens of Kentucky by concealing his interest in Seton and the elements of the offense were otherwise established.

Gray argues (86-286 Br. 13 n.8), however, that the jury was alternatively instructed that it could also convict the defendants if, instead, it found that Hunt "had such power over the responsible officials of the Commonwealth of Kentucky that he was able to control the awarding of the Commonwealth of Kentucky's Workmen's Compensation Contract to Wombwell Insurance Company for the years 1975 through 1979" and "directed commissions from the Commonwealth of Kentucky's Workmen's Compensation Contract to Seton Investments, Inc." (5 C.A. App. 1343). Because the jury may have based its verdict on that alternative basis looking to Hunt's role as a de facto public official (which was amply supported by the facts), Gray argues that both theories must be legally sufficient in order for the conviction to be upheld and that the fact that he was a public official is irrelevant (86-286 Br. 13 & n.8).

The flaw in this argument is that the alternative instruction looking to Hunt's role as a de facto state official also provided that, in order to convict either defendant, the jury must conclude that he aided and abetted

Hunt in that scheme (5 C.A. App. 1343).[22] Gray, of course, was convicted, and if one supposes that it was under this alternative instruction, it necessarily follows that the jury found that Gray, a public official, aided and abetted Hunt in carrying out the scheme.[23] In doing so Gray clearly breached his fiduciary duty to the state and its citizens, owed on account of his public office. Thus, under either alternative of the intangible rights theory presented to the jury, it necessarily found a breach of duty by Gray, an actual public official. There is therefore no occasion to reach the question whether the convictions could have been based on an intangible rights theory looking to Hunt's status as a de facto public official.

Second, even if the jury had not necessarily found that Gray breached a duty arising from his status as an actual public official, the convictions should nevertheless be affirmed based on the actions of Hunt. There are plainly instances where persons not on the public payroll are entrusted with governmental authority and given power to carry on the state's business. In such a situation, it is at least clear that those individuals have a duty not to use that governmental power to criminally profit themselves or their friends.[24] While close cases no doubt can be hypothesized, this is not one of them. As the Second Circuit recognized in *Margiotta*, courts in mail fraud prosecutions must not threaten to criminalize lobbying or political party activities (688 F.2d at

[22] See note 8, *supra*.

[23] Furthermore, any doubt that Gray was part of the conspiracy is laid to rest by the fact that the jury convicted him on a conspiracy count as well as on a mail fraud count.

[24] Kentucky law contemplates such a conclusion. The state bribery statute defines "[p]ublic servant" to include not only "[a]ny public officer or employe of the state" (Ky. Rev. Stat. Ann. § 521.010(1)(a) (Michie/Bobbs-Merrill 1985)), but also "[a]ny person exercising the functions of any such public officer or employe" (*id.* § 521.010(1)(b)).

122), but instead must be sensitive to First Amendment considerations (*id.* at 128-129). However, as that court also concluded, courts ought not be deterred in cases where "[t]he First Amendment concerns raised • • • are a chimera" (*id.* at 129).

McNally's argument that "Hunt was not a de facto public official" (86-234 Br. 19) is totally without merit. He repeatedly misstates the facts to support that contention, stating that Hunt merely "exercised some influence over some decisions of a state official" (*id.* at 16) and "suggest[ed] that Insurance Commissioner McGuffey award the workmen's compensation policy to Wombwell" (*id.* at 20). However, the jury was not instructed that it could convict if it concluded that Hunt had "some influence" over the awarding of the state's insurance policies and made "suggestions" on that matter to McGuffey. It was instructed that it had to conclude that Hunt "was able to control" the award of the state's workmen's compensation policy and that he "directed commissions" from Wombwell to Seton (5 C.A. App. 1343). The evidence clearly showed that he did.[25] The governor gave Hunt the authority to decide to whom the state's insurance contracts should be awarded and Hunt exercised that authority in place of the insurance commissioner. (Pet. App. 11a; 2 C.A. App. 323-330). There is no reason why his misuse of that delegated public trust should be viewed differently under the mail fraud statute than

[25] McNally contends (86-234 Br. 22) that McGuffey "did not always follow Hunt's suggestions," citing 2 Tr. 15, 16. McNally thus refers to McGuffey's answer, concerning policies other than the workmen's compensation insurance policy (as to which he testified that he always followed Hunt's instructions), to the question whether he had ever not followed Hunt's instructions. He replied: "On one situation he did not want to renew a certain policy with an agency and I did not, but later on I gave him some" (2 Tr. 16, reprinted at 2 C.A. App. 330). That inconclusive comment hardly undercuts the jury's conclusion, which the court of appeals found was supported by the evidence (Pet. App. 10a-11a), that Hunt controlled the awarding of the state's insurance policies.

would similar conduct engaged in by the Insurance Commissioner.[26]

Finally, Gray's contention (86-286 Br. 28-29, 34-37) that federalism concerns weigh against continued recognition of the intangible rights theory under the mail fraud statute is also unpersuasive. At least where, as here, the intangible right asserted concerns freedom from unlawful self-dealing by persons in the exercise of governmental powers, federal prosecution of schemes to defraud does not conflict with state interests but instead advances those interests. Concurrent criminal jurisdiction over schemes to deprive citizens of the states of their intangible rights sometimes provides a process with which to address frauds that otherwise might not be prosecuted locally. Where the unlawful conduct constitutes or is intimately tied to local corruption, federal authority may be the most effective—or even the only—means by which the illegality will be investigated and prosecuted. Indeed, federal law enforcement has at times played a signal role in identifying and rooting out entrenched patterns of local corruption. See, *e.g.*, *United States* v. *Silvano*, No. 86-1460 (1st Cir. Mar. 4, 1987) (acting Boston budget director); *United States* v. *LeFevour*, 798 F.2d 977 (7th Cir. 1986) (chief judge of Cook County traffic court); *United States* v. *Matthews*, 773 F.2d 48 (3d Cir. 1985) (Atlantic City Mayor, City Commissioner, and Director of Revenue and Finance);

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[26] Contrary to petitioner's claims, if Hunt had merely exercised that authority to reward insurance agents who had supported the governor, they never would have been indicted, since the government has never claimed that directing Wombwell to split excess commissions with valid insurance agencies not controlled by Hunt and Gray violated any law. Gray was indicted and convicted only because he and Hunt abused their authority by devising a scheme to divert excess commissions into their own pockets. McNally was indicted and convicted only because he aided and abetted that scheme in return for payments.

United States v. *Gorny*, 732 F.2d 597 (7th Cir. 1984) (Deputy Commissioner of Cook County Board of (Tax) Appeals); *United States* v. *Blanton*, 719 F.2d 815 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984) (state governor, special consultant, and special assistant). Moreover, most states, like Kentucky, prohibit bribery and kickback schemes and most other acts that are prosecuted under the intangible rights theory.[27] A reading of Section 1341 that authorizes federal prosecutions of public officials for scheming to defraud the public of its right to the honest performance of governmental functions neither intrudes into an area of conduct which a state might wish to legalize, nor denies a state's jurisdiction to define and prosecute intangible frauds, any more than the statute intrudes on a state's ability to prosecute frauds against tangible interests.

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[27] Of course, the fact that a fraudulent scheme violates state laws does not exclude it from the proscriptions of the federal mail fraud statute. *Badders* v. *United States*, 240 U.S. 391, 393 (1916). The federal interest in protecting the postal system from misuse justifies Congress in prohibiting the use of the mails to defraud persons of legal rights, whether tangible or intangible in nature.

For that reason, Gray's reliance on *United States* v. *Bass*, 404 U.S. 336 (1971) (86-286 Br. 28-29), is particularly misplaced. The Court in *Bass* held that "[a]bsent proof of some interstate commerce nexus in each case, [18 U.S.C.] § 1202(a) [App.] dramatically intrudes upon traditional state criminal jurisdiction" (*id.* at 350). Here, in contrast, the basis for federal jurisdiction is spelled out in the statute's requirement of the use of federal mails in furtherance of the scheme, and that is clearly a sufficient basis for federal jurisdiction.

In general, Gray's argument is contradictory. He (incorrectly) argues, on the one hand, that it is inappropriate "to extend the application of the mail fraud statute where there was not even arguably a violation of state criminal or civil law" (86-286 Br. 33), while, on the other hand, contending that it is inappropriate to extend the mail fraud statute to apply to cases also involving breaches of state law (*id.* at 28-29). Both of Gray's arguments are wrong. The federal mail fraud statute prohibits all acts within the meaning of the words of the statute, fairly construed, whether or not state law also prohibits such acts.

II. PETITIONERS WERE PROPERLY CONVICTED OF CONSPIRACY

Petitioners and Hunt were charged with conspiracy, in violation of 18 U.S.C. 371, (1) to violate the mail fraud statute by defrauding the citizens of Kentucky of their intangible rights and by obtaining money and property through false representations, and (2) to defraud the United States of tax revenues. Note 7, *supra*. The district court instructed the jury that to convict on the conspiracy count it must unanimously find that petitioners agreed to achieve at least one of the two objectives of the conspiracy. 5 C.A. App. 1336. Therefore, in convicting petitioners on the conspiracy count, the jury necessarily unanimously concluded that petitioners conspired to violate the mail fraud statute, or to defraud the United States of tax revenues, or both. The court of appeals affirmed the conspiracy convictions on the basis that the evidence clearly showed a conspiracy to violate the mail fraud statute, but did not consider whether it was also sufficient to support the conclusion that they conspired to defraud the United States of tax revenues. Pet. App. 11a n.2.

Gray contends (86-286 Br. 37-43) that the court of appeals erred by not considering the sufficiency of the evidence of conspiracy to defraud the United States of tax revenues, and seeks a remand to the court of appeals for determination of that issue. If the court of appeals determines that the evidence does not support the tax fraud conspiracy, Gray contends that petitioners' conviction on the conspiracy count must be vacated, because under the instructions as given the jury may conceivably have based its verdict on that theory.[28]

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[28] In making this argument, Gray assumes *arguendo* that petitioners were properly convicted on the mail fraud count. Gray notes (86-286 Br. 39 n.47) that, if the Court reverses petitioners' convictions on the mail fraud count, it follows that the Court should reverse the conspiracy convictions as well. That is correct. Since

A. Although unlikely, it is theoretically possible that the jury concluded that petitioners conspired to defraud the government of tax revenues and also concluded that they did *not* conspire to violate the mail fraud statute (or did not reach the issue), even though it convicted them on the substantive mail fraud count. There is, however, no reason to waste judicial resources as Gray proposes, since it is clear that the jury found a conspiracy to commit mail fraud because the substantive mail fraud count on which it convicted petitioners was substantially identical to the mail fraud aspect of the conspiracy count. The only differences between the counts are that the government had to establish that the mails were actually used under the substantive count, while under the conspiracy count it had to prove that the defendants entered into an agreement (compare note 7, *supra*, with note 8, *supra*). There is no serious issue as to whether petitioners and Hunt acted in concert and pursuant to a common understanding in their dealings concerning Seton and the payment of excess commissions, and they do not argue that question before this Court. Indeed, it is impossible to imagine how, on the evidence, the jury could logically have found both petitioners guilty of mail fraud without also concluding that they engaged in a conspiracy to commit that offense.[29] The jury may *also*

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the jury almost certainly concluded that petitioners conspired to violate the mail fraud statute, petitioners' conspiracy convictions cannot stand if the allegation that their acts violated the mail fraud statute is legally defective. *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931).

[29] Petitioners argued at trial that they did not violate the mail fraud statute because McNally, rather than Hunt and Gray, owned Seton. But the jury rejected that argument and the court of appeals affirmed its conclusion that Hunt and Gray controlled Seton (Pet. App. 4a). Accordingly, there is no question that, contrary to petitioners' arguments, Hunt and Gray established Seton, purchased and used the two condominiums, and concealed their ownership by persuading McNally to serve as Seton's front man. In addition, the jury necessarily found either that petitioners aided and abetted

have concluded that petitioners conspired to commit tax fraud.[30] However, it makes no difference whether the jury concluded that petitioners conspired to commit both mail fraud and tax fraud since petitioners were convicted on only one conspiracy count.

In *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976), the defendant was charged with conspiring (1) to violate the securities laws, and (2) to violate the mail fraud statute. The defendant was also charged with committing a number of substantive offenses in violation of the securities laws and the mail fraud statute. The jury convicted on all counts. The court of appeals affirmed the convictions on the securities law counts, reversed on the mail fraud counts, but nonetheless affirmed on the conspiracy charge. The court referred to the opinion of Judge Learned Hand in *United States* v. *Mack*, 112 F.2d 290 (2d Cir. 1940), which let stand a conspiracy conviction where a conspiracy to engage in three offenses was alleged but only one was proved (536 F.2d at 1401). Noting that some courts had questioned the applicability of such reasoning where "a reviewing court cannot tell what

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Hunt or that McNally aided and abetted Gray (see pages 30-32, *supra*), and the court of appeals concluded that both findings were supported by the evidence (Pet. App. 9a-11a). Given those conclusions, it is clear beyond question that petitioners entered into an agreement, even though Gray describes our contention that the jury obviously concluded that petitioners conspired to violate the mail fraud statute as "conjecture" (86-286 Br. 38 n.46).

[30] The evidence showed that Seton did no business at all, but that it paid taxes at lower rates than Hunt and Gray (4 C.A. App. 934-941). That supported petitioners' convictions for tax fraud conspiracy under *United States* v. *Klein*, 247 F.2d 908 (2d Cir. 1957), since it showed that taxes were paid by a shell corporation at a rate lower than the persons who should have paid the taxes. Seton also took a business deduction for the payment of $38,500 to Hunt's son that was improper because it did no business. McNally could of course conspire to commit tax fraud, even though fraud in connection with his own taxes was not an object of the conspiracy.

offense or offenses alleged in a conspiracy indictment were found by the jury," the *Dixon* court found those cases distinguishable because "here we know from the conviction on [a substantive securities fraud count] that the jury found that Dixon had committed the offense validly charged in the conspiracy count" (*id.* at 1402). The court thus found "no basis for questioning the conviction on the conspiracy count" (*ibid.*). The same precise reasoning governs here, given the jury's conviction on the substantive mail fraud count.

No decision of this Court holds that an appellate court must determine whether the evidence was sufficient to support the conclusion that defendants conspired to achieve each objective of a conspiracy with multiple objectives, where it is clear that the jury concluded that the defendants conspired to achieve a particular objective that was supported by the evidence. In arguing that the court of appeals erred by not reviewing the sufficiency of the evidence relating to the tax conspiracy, Gray relies primarily on this Court's decision in *Yates* v. *United States*, 354 U.S. 298 (1957). In *Yates* the defendants were charged with conspiring (1) to advocate the overthrow of the government of the United States by force and violence, and (2) to organize the Community Party. As in this case, the jury returned a general verdict of guilty. The Court concluded that the conviction could not stand on the basis that the defendants had conspired to organize the Communist Party.[31] The Court then reversed the conspiracy conviction, concluding that a verdict must "be set aside in cases where the verdict is supportable on one ground,

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[31] The government contended that "organize" as used in 18 U.S.C. 2385 referred to a continuing process of running an organization. The Court rejected that contention, holding that "the word refers only to acts entering into the creation of a new organization" (354 U.S. at 310). Since it was undisputed that the defendants had not been involved in the creation of the Communist Party, it followed that they had not conspired to "organize" it within the meaning of the statute.

but not on another, *and it is impossible to tell which ground the jury selected*" (354 U.S. at 312 (emphasis added)). *Yates* is clearly inapplicable because, as we have shown, it is readily apparent that the jury found at least a conspiracy to commit mail fraud.[32]

Gray also relies on *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), in support of his contention that in these circumstances it is

[32] Gray also relies on *Cramer* v. *United States*, 325 U.S. 1 (1945). The defendant in *Cramer* was charged with treason, and the Treason Clause of the Constitution (Art. III, § 3) requires, in the absence of a confession, that two witnesses testify to the same overt act committed as part of the offense to establish treason. Three overt acts were submitted to the jury, but the Court concluded that two of the overt acts did not support a guilty verdict because they did not show that the defendant intended to give aid and comfort to the enemy (325 U.S. at 48). It accordingly reversed the conviction. The Court noted, before concluding that two of the overt acts were defective, that "[*s*]*ince it is not possible to identify the grounds on which Cramer was convicted*, the verdict must be set aside if any of the separable acts submitted was insufficient" (*id.* at 36 n.45 (emphasis added)). That dictum is not relevant here because it *is* possible to identify the ground on which petitioners were convicted.

This Court's decision in *Stromberg* v. *California*, 283 U.S. 359 (1931), is not relevant for the same reason. The defendant there was charged with violating three alternative clauses of a state statute. The Court concluded that the first clause of the statute was unconstitutional, and reversed the conviction, stating: "[*I*]*t cannot be determined upon this record* that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses." 283 U.S. at 368 (emphasis added).

The Third Circuit's decision in *United States* v. *Tarnopol*, 561 F.2d 466 (1977), is also not relevant for the same reason. The court there stated that "*it is impossible to determine* whether or not the jury based its verdict upon less than all three of [the alleged objectives of the conspiracy] and, if so, upon which ones the verdict was founded" (*id.* at 474 (emphasis added)).

necessary to remand for further proceedings in the court of appeals. In *Dansker*, the jury convicted the defendants on two counts of bribery—of a mayor and a minor official—and on a conspiracy count that charged an agreement to bribe either or both of them. The court of appeals upheld the conviction for bribery of the mayor, but reversed the conviction for bribery of the minor official because it concluded that the minor official had not been given money in exchange for any official act. It then reversed the conspiracy conviction, stating that "the possibility • • • remains, *albeit slim*, that the jury found that the defendants engaged in a conspiracy to bribe [the minor official] alone in spite of its guilty verdict [on the count alleging bribery of the mayor]" (537 F.2d at 51 (emphasis added)). We believe that *Dansker* was wrongly decided. When there is but a "slim" chance that the jury based its verdict on one theory, and the evidence unquestionably supports its verdict on the other theory, it is reasonable to assume, as the Second Circuit did in *Dixon*, that the verdict was in fact based on the theory that is clearly supported by the evidence. To do otherwise is to mandate a presumption that juries behave irrationally.[33]

B. Even if it were not clear that the jury concluded that petitioners conspired to violate the mail fraud statute, the conspiracy conviction should be upheld solely on the basis of the substantial evidence indicating a conspiracy to commit mail fraud.[34] This Court has held that

[33] Moreover, this case is distinguishable from *Dansker* since the jury here did not return any guilty verdict relating to a substantive tax fraud violation, while the jury in *Dansker* returned a guilty verdict on the count alleging that the defendants had conspired to bribe the minor official.

[34] It would be possible to tell what route the jury took if conspiracy charges were made in separate counts or the jury returned a special verdict. However, it follows from this Court's decision in *Braverman* v. *United States*, 317 U.S. 49, 54 (1942), that a single conspiracy to achieve multiple objectives is properly charged

a guilty verdict must be reversed where the jury was instructed that it could convict on alternative theories, one of the theories is legally defective, and it is not clear on which theory the jury convicted. *Yates*, 354 U.S. at 312; *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931).[35] But where none of the alternative theories is legally defective, and the defendant merely claims that the evidence was insufficient to support one of the alternative theories, it is reasonable to assume that the jury convicted on the alternative theory (if there is one) that was supported by the evidence and not on the alternative theory that was not supported by the evidence. To do otherwise requires an assumption that the jury acted irrationally. In that respect, the case is far different than one like *Stromberg*, where the jury could quite rationally have relied on the impermissible theory, not knowing of its legal defect.

This conclusion follows from this Court's reasoning in *Turner* v. *United States*, 396 U.S. 398 (1970), where a conviction on a charge of purchasing, possessing, dispensing, and distributing heroin without revenue stamps attached, in violation of 26 U.S.C. (1964 ed.) 4704(a), was affirmed on evidence showing only possession. "Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence. • • • The general rule is that when

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in one count. Special verdicts are not always a possible alternative, since defendants in criminal cases sometimes oppose their use and obtain reversal on the ground that special verdicts tend to lead juries to convict. See *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir. 1969).

[35] There is also disagreement in the lower courts as to whether a conspiracy conviction should be upheld where the jury could properly have concluded that the defendants conspired to achieve one objective of the conspiracy but could not properly have concluded that the defendants conspired to achieve another objective, and it is not clear what route the jury took in reaching its verdict. See *Dixon*, 536 F.2d at 1401.

a jury returns a guilty verdict on an indictment charging several acts in conjunctive, • • • the verdict stands if the evidence is sufficient with respect to any one of the acts charged" (396 U.S. at 420).

Nor does it offend due process to assume that a jury based its verdict on an alternative that was supported by the evidence rather than on an alternative that was not supported by the evidence. Due process requires that criminal convictions be supported by proof beyond a reasonable doubt of every fact necessary to establish the offense charged. *In re Winship*, 397 U.S. 358, 364 (1970). Thus, a reviewing court must satisfy itself that the defendant was not convicted of an offense for which inadequate evidence was adduced. In order not to impinge unduly on the jury's role, however, it must view the evidence in the light most favorable to the government and draw all reasonable inferences in favor of the jury's verdict. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Following that approach, this Court has stated that "[s]ufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support *any* rational determination of guilt beyond a reasonable doubt. • • • The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt." *United States* v. *Powell*, 469 U.S. 57, 67 (1984) (emphasis added).

Translating these principles to the situation presented here, a defendant is entitled to a determination whether the evidence supports his conspiracy conviction. If the evidence supports the conclusion that the defendant conspired to achieve one objective of the conspiracy, then the evidence supports the conviction. The defendant is not entitled, however, to a determination that rules out all possibility of mistake by the jury. Accordingly, once an appellate court determines that the jury could ra-

tionally have concluded that the defendants conspired unlawfully as charged, it need not further determine whether the jury could have also reached that conclusion by taking a route not supported by the evidence. The court of appeals thus acted properly in affirming without considering the sufficiency of the evidence of a conspiracy to commit tax fraud.[26]

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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[26] Gray is way off the mark in arguing (86-286 Br. 43 n.51) that the rule we propose will permit the government to "charge a defendant with multiple objects of a conspiracy, deliberately decline to present any evidence concerning any object except for one and nevertheless insist that the jury be instructed concerning all objects listed in the indictment." If the government fails to introduce evidence supporting the conclusion that the defendants conspired to achieve an objective charged in the indictment, the court should not instruct the jury on that objective, but should instead strike the part of the indictment not supported by any proof. See *United States* v. *Miller*, 471 U.S. 130, 132-134 (1985); Fed. R. Crim. P. 29(a).

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER GRAY IN NO. 86-286

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I.

A. In petitioner Gray's opening brief, we argued first that his conviction for mail fraud, which was affirmed by the Sixth Circuit solely on the basis of an "intangible rights" theory, was inconsistent with the language, purpose, case law and rules of construction relevant to the mail fraud statute, 18 U.S.C. § 1341. Oddly, the government in response does not immediately turn to these issues. Instead, despite the court of appeals' clear holding on the issue, the United States argues that this issue "need not be reached" in this case. U.S. Br. 17. The

government's effort is, however, tardy and, in any event, wrong.

1. First, the government's argument is more appropriately raised, if at all, in opposition to the petition for certiorari. But the government did not argue that the "intangible rights" issue was not properly before the Court. Instead, it urged denial of certiorari on the traditional grounds that the holding below was correct and "does not conflict with the decision of any other court of appeals." U.S. Br. in Opp. 4. As this Court explained in *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985), its "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the *questions presented in the petition*." *Ibid.* (emphasis added). The government simply ignores that fact in its effort now to convince the Court *not* "to review an issue squarely presented to and decided by the Court of Appeals . . . ." *Ibid.*[1] What the Court concluded in *Tuttle* is dispositive here: "Respondent's attempt to avoid the question now comes far too late." *Ibid.*

2. The government's effort to avoid a decision on the "intangible rights" theory rests on a selective analysis of the instructions to the jury and ignores the evidence in this case. The government asserts that, because the jury was read the indictment which included references both to a scheme to defraud intangible rights and to a scheme to obtain money by means of fraudulent representations, the jury *must* have found that petitioners obtained money by some fraudulent representations.

[1] The government makes no apology for seeking to have a criminal conviction affirmed now on a basis which was not even mentioned by the court of appeals and which was not argued by the government as an independent basis for affirmance in the court of appeals. The reasoning in *Tuttle*, which involved a civil rights suit, should apply with special force in a criminal case, where the defendant's stake in the outcome is so much greater.

U.S. Br. 19-22.[2] The government's argument ignores the basic principle that jury instructions must be read as a whole. *Hamling* v. *United States*, 418 U.S. 87, 107-108 (1974); *Boyd* v. *United States*, 271 U.S. 104, 107 (1926). After reading the indictment, the district court then instructed the jury as to what it had to find in light of the evidence at trial in order to convict under the mail fraud statute. In that portion of the instruction, the court told the jury that it could convict if it found that petitioner Gray aided and abetted Hunt in using his political influence to control the insurance contract and in directing commissions to Seton without disclosing Hunt's interest in Seton to State government officials. See U.S. Br. 10 n.8 (quoting the instruction in full).

Wholly missing from that instruction is any required finding of financial loss to the State of Kentucky or of financial gain to the defendants. Thus, in order to find petitioner Gray guilty, the jury clearly was not required to make *any* findings that he obtained money under false pretenses as a part of the alleged scheme. Until its merits brief in this Court, the government's theory in this case was that financial consequences were irrelevant to its mail fraud prosecution of petitioners.[3] The government's closing statement to the jury could not be more explicit on this issue (C.A. App. 1245; 26 Tr. 10):

[2] The indictment as read to the jury also described the tax fraud element of the offense. The government does not, however, explain why it is more likely that the jury found petitioners guilty of mail fraud on the basis of the portion of the indictment referring to false pretenses than to the portion dealing with defrauding the United States of taxes. *Compare* U.S. Br. 9 n.8 with 10 n.8. The point is that the *indictment* in all of its particulars did not reflect accurately the theory of the case. The theory of the prosecution was set out in the description following the indictment and it bears no relationship to the government's new theory advanced in this Court to avoid the issue decided by the court below and presented in this case.

[3] This is why there is *no evidence* in the record that petitioner Gray received any of the commissions. The government's argument

> "Now, in this kind of mail fraud case where the rights of the citizens to honest government has been deprived, the United States does not have to prove an actual dollar loss, a financial loss to the state. What the United States must prove is that the State of Kentucky was deprived of its right to have its public officials carry out their official duties honestly and impartially."

Accordingly, it is clear in this case that rejection by this Court of the "intangible rights" theory of mail fraud will require reversal of petitioner's convictions.

B.1. On the merits of the "intangible rights" theory, the government asserts that use of the term "defraud" somehow demonstrates Congress' intent to prohibit broadly all deceitful action involving the mails, regardless of whether any property rights are affected. The government, however, has produced nothing to show that private fraud prior to 1872 was ever defined in terms of "legal rights" wholly unrelated to property.

The government's sole support for its interpretation of fraud—law dictionaries—undermines its contention. *All* of the definitions discuss fraud as depriving an individual of a "*right*" as a necessary element. U.S. Br. 23. As Bouvier explained, "legal rights" "are those where the party has the legal title to a thing; and in that case his remedy for an infringement of it is by an action in a court of law." 2 *Bouvier's Law Dictionary* 929 (1897). Even today, no private citizen can sue a public official simply for failure to be honest or unbiased

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on this issue is unusually lame: it maintains that a female friend of petitioner was permitted by McNally to rent at a below-market rate a property purchased with the commissions and that petitioner visited her. U.S. Br. 19 n.14. The jury, however, was not asked to decide whether petitioner received anything of value from the commission-splitting arrangement. Moreover, on the evidence relied upon by the government, it could *not* have made such a finding. The record showed that the below-market rate was charged because petitioner Gray's friend performed bookkeeping and billing services for Seton without receiving any salary.

in making public decisions. There is simply no basis for concluding that any private person has an "enforceable" or "well-founded claim" [4] to have his affairs conducted honestly, if no property interest is affected by the alleged deception.[5]

2. In our opening brief, we explained that the 1909 amendment to the mail fraud statute clearly indicated that Congress understood the term "defraud" to mean deceptive acts which injure the victim in his money or property. Gray Br. 20-22. A telling omission in the government's brief is its failure to respond to the contention that the reference to "money or property" in Section 1341 is direct evidence of Congress' intent to limit the statute. The government does no more than assert that "the clauses should be read separately." U.S. Br. 30 n.21. To be sure, use of the disjunctive "or" customarily requires clauses to be read separately, but the history of the 1909 amendment completely undermines this general rule of construction.

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[4] The definition of a "right" which the government itself offers as authoritative describes "right" in terms of an "enforceable claim or title" or "a well-founded claim." But that is simply the definition of an intangible *property* right, such as a chose in action. U.S. Br. 23 n.18, quoting W. Anderson, *A Dictionary of Law* 904 (1893); 2 *Bouvier's Law Dictionary* 927 (1897). Petitioner Gray does not dispute that the term "fraud" extends to intangible *property* rights, but no such "right" is involved in this case.

[5] While the government is content to assert that its unlimited construction of Section 1341 is justified because "there is no reason to suppose that the statute was intended only to reach schemes affecting property and other intangible rights" (U.S. Br. 23), it ignores its duty to show that Congress clearly intended to outlaw the conduct in question. The government cites not a single case of "fraud" in the Nineteenth Century that involved some "right" not recognized as "property." Moreover, the government completely ignores the common law cases cited by petitioner Gray in his opening brief (Gray Br. 15 n.11), which indicated that fraud required injury to property. Thus, in fact, there is ample reason to suppose the statute was limited precisely as petitioners have proposed.

The government agrees with petitioners (U.S. Br. 25) that the 1909 amendment codified the result in *Durland* v. *United States*, 161 U.S. 306 (1896). As we explained in the opening brief, this Court in *Durland* expanded the means for effecting "fraud" beyond misrepresentations of past or existing fact. The 1909 amendment added future promises as a type of "fraud," and described the object of the fraud in terms of "money or property." The government asserts that this amendment shows Congress' broad intent "to prohibit frauds of all kinds." U.S. Br. 25. But the government does not explain why Congress would have intended to restrict the objects of this form of "fraud" more narrowly than traditional fraud, *i.e.*, the government cannot explain why the use of promises as the means to defraud are offensive only when money or property is at stake, but all other fraudulent acts are illegal whether they cause injury to money, property *or* "legal rights." The more reasonable interpretation of the amendment is that Congress recognized that money and property are the objects of all forms of "fraud" within the meaning of 18 U.S.C. § 1341. Congress' clear purpose to codify *Durland* can only be accomplished fully if the two clauses are interpreted as interrelated in the way petitioners have contended. Comment, *The Intangible Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. Chi. L. Rev. 562, 571-72 (1980).[6] Thus,

[6] The government attempts to bolster its analysis by reference to 18 U.S.C. § 371, which outlaws schemes to defraud the United States. There is no question that this provision, which was enacted well after the relevant language in 18 U.S.C. § 1341, has been interpreted to include schemes which "interfere with or obstruct one of its lawful functions by deceit." But this Court has long recognized a distinction between fraud against the United States and "the words 'to defraud' as used in some statutes . . . [which] refer rather to wronging one in his property rights by dishonest methods or schemes." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). The government is quite right that Section 371 is "not dispositive" (U.S. Br. 26); in fact, it is not relevant to a proper interpretation of 18 U.S.C. § 1341 and this Court already has held as much.

the language of Section 1341 clearly undermines the government's "intangible rights" theory.

C. In its effort to defend the "intangible rights" theory in this case, as was presented to the jury, the government only demonstrates the danger of removing mail fraud from the property-based moorings intended by Congress. The government freely admits that often it will not "be obvious whether the object to be denied by a scheme is fairly termed a *legal right*." U.S. Br. 29 (emphasis added). The reason for this is plain. There is no definition in Section 1341 or anywhere else of what is a "legal right." Nor does the government propose any definition here. A "legal right" is whatever a federal prosecutor thinks it is. This is why under the "intangible rights" theory a federal mail fraud prosecution can be pursued with an allegation that the California Department of Motor Vehicles' "legal right" to have its drivers' license program administered free of deceit was violated when an applicant used a fictitious name in obtaining a license. *United States* v. *Green*, 577 F. Supp. 935 (N.D. Cal. 1984).

The government can offer no limiting principle for its "intangible rights" theory as submitted to the jury in this case. There is therefore no meaningful way that the mail fraud statute, as interpreted by the government, can possibly supply notice to persons of reasonable intelligence sufficient to satisfy minimum due process requirements.

Because the government is clearly uncomfortable with the legal issue as presented through the instructions to the jury, the government in its brief grossly mischaracterizes the facts in order to make the patronage scheme, which is the sole basis for petitioners' convictions, somehow appear "venal." U.S. Br. 27. The government asserts that the citizens of a state have a "right" to de-

mand that public officers not use their power "to line their pockets with public funds." U.S. Br. 29. What the government fails to mention is that the jury was not asked to find that any "public" money was obtained by petitioners. Moreover, the evidence is uncontested that *no* "public funds" were involved in the patronage scheme. If they had been, then this case would not involve "intangible rights." The government's own witness at trial, the former State Insurance Commissioner, testified that the premium for the policy was set by an out-of-state rate-making authority (C.A. App. 343-345; 2 Tr. 48-50), and that the insurance commissions were contractually arranged between Wombwell and the underwriter. C.A. App. 346-347; 2 Tr. 53-54. Nothing Hunt or petitioners could do affected the amount of money the State paid. Thus, Kentucky and its citizens were deprived of no property because of the patronage scheme. The Wombwell Insurance Company parted with some money, but the government did not allege or attempt to prove that Wombwell was a victim of any scheme to defraud.[7]

D. The government does not directly discuss the cases from this Court relied upon by petitioner Gray to support his construction of 18 U.S.C. § 1341. See Gray Br. 22-25. The government instead cites the handful of courts of appeals' decisions which have embraced the "intangible rights" theory. U.S. Br. 27-28. See *United*

[7] In support of its erroneous argument that in this case the jury could have found that money was obtained by false pretenses (See pp. 2-4, *supra*), the government claims that Wombwell was misled about Seton and its status as an insurance agency. U.S. Br. 20-21 and n.17. The evidence on the status of Wombwell was contested and the jury was not asked to determine whether Seton was a bona fide agency. Thus, the government's assertions about Seton are not *facts* found by the jury. Moreover, the fact that Seton did not engage in the business of insurance in addition to its real estate business but nevertheless received commissions was not unusual. The patronage scheme provided commissions to a clerk of a county court and to a state senator, both of whom held insurance licenses, but were not engaged in the business of insurance. C.A. App. 312, 314; 1 Tr. 110, 112.

States v. *Mandel*, 591 F.2d 1347, 1360, *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 445 U.S. 961 (1980) and *United States* v. *States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). But those cases relied heavily upon a blatant misreading of this Court's decision in *Badders* v. *United States*, 240 U.S. 391 (1916). In *Badders*, this Court held that Section 1341 was within Congress' broad power to enact, but the Court said nothing about the scope of the mail fraud statute's prohibitions. The Fourth Circuit in *Mandel* and the Eighth Circuit in *States*, however, derived the "intangible rights" theory directly from *Badders*, which had nothing to do with that issue.[8]

E. Finally, the government argues that the rule of construction favoring lenity should be ignored here. The government simply asserts that there is no ambiguity in the federal mail fraud statute. But "at the end of the process of construing what Congress has expressed,"[9] it cannot be doubted that this statute is, if nothing else, unclear. The *most* that can be said for the government's construction is that it lies at the outermost reaches of anything Congress could even have imagined in 1872. This is not a case where Congress expressed its intent to exercise the full range of its constitutional authority

[8] The third major case, *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), relied upon this Court's decisions interpreting statutes other than the mail fraud statute, primarily *Hammerschmidt* v. *United States*, *supra*, which the government concedes is "not dispositive." U.S. Br. 26.

Even though the mail fraud statute was misconstrued in the cases involving Governors Kerner and Mandel, those defendants were also convicted of other offenses which were legally sufficient and independent of the mail fraud counts. Thus, reversal of the mail fraud counts in those cases would not have materially affected them. Here, by contrast, reversal on the "intangible rights" theory will require dismissal of all charges against petitioners.

[9] *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

in prohibiting certain activities. Compare *McElroy* v. *United States*, 455 U.S. 642, 658 (1982). Section 1341 does not outlaw all "bad" acts involving the mails. *Hammerschmidt* v. *United States*, 265 U.S. at 188. Accordingly, the mail fraud statute lacks the clarity of expressed congressional intent that would allow this Court to ignore the basic and fundamentally fair principle of construction embodied in the rule of lenity.

II.

In his opening brief, petitioner Gray argued alternatively that the "intangible rights" theory could not be applied to convict a political party leader for breach of a "fiduciary duty" that he allegedly owed to the public because a jury found him to be a "de facto" public official. Gray Br. 30-37. This issue arose because the jury had been instructed that it could convict petitioners as "aiders and abetters" of Hunt, the leader of the State's Democratic party, who held no public office. On this issue the government again devotes more effort to arguing that the question presented need not be decided than it does to responding to petitioners' contentions. But the government's argument is no more availing here than it was on the first issue.

There can be no question that the petitions for a writ of certiorari clearly and unequivocally raised the issue of whether the "intangible rights" theory can extend to a non-public official. The court of appeals clearly decided the issue at the government's request (Pet. App. 9a-11a) and the government's opposition in no way suggested that the issue was not properly before this Court. Thus, for reasons already stated, the issue is appropriate for resolution.

The government commits the same error it committed with respect to the basic "intangible rights" ruling; it parses the jury instructions improperly and then asserts that the jury decided matters which in fact the instructions clearly did not require it to decide. The government asserts that because petitioner Gray held a public office, Hunt's role in the patronage scheme is irrelevant.[10] The fatal flaw in this argument is that it ignores the jury instructions. The court told the jury that it could find petitioners guilty if (1) Hunt breached any de facto duties to the public and petitioners aided and abetted that violation "*or*" (2) if petitioner Gray breached any duty he owed to the public and petitioner McNally aided and abetted the violation. U.S. Br. 10 n.8 (emphasis added). The jury was *not* required to find that petitioner Gray acted as a public official when he allegedly "aided and abetted" Hunt any more than it had to find that McNally was a public official, which he clearly was not.[11] The jury was required to find only that Gray, as a person, not a public officer, aided and abetted Hunt, a political party leader operating a patronage arrangement. Thus, the government's attempt to extend the "intangible rights" doctrine to political leaders is clearly presented in this case.

The government's argument in support of this extraordinary expansion of federal power is quite modest; it simply finds "no reason" (U.S. Br. 33) not to impose upon state political party leaders who are exercising patronage authority a duty to the public enforceable by a federal criminal statute. The government completely

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[10] The government attempts to bolster this argument by contending that only one "member of the conspiracy need be a public fiduciary." U.S. Br. 31. Petitioner is at a loss to understand what possible relevance this assertion has when the issue involves a substantive mail fraud count and not conspiracy. In any event, the alternative instruction clearly focused on Hunt as the only "public fiduciary."

[11] In the closing argument, the government identified how Gray "aided and abetted" Hunt—"by setting up Seton . . . [and] by running Seton." C.A. App. 1254; 26 Tr. 19. It was undisputed that petitioner Gray "set up Seton" months before he was appointed to office and stopped "running" Seton when he took office. Thus, it is clear that the government and the jury did not regard Gray's official status as relevant to the aiding and abetting charge.

abjures its duty to present a "clear statement" of legislative intent which could assure this Court "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" in this case. *United States* v. *Bass*, 404 U.S. 336, 349 (1971).[12] There is not the slightest evidence, however, of legislative intent to prohibit political patronage as part of the mail fraud statute.

This case reveals quite clearly the danger inherent in the expansion of the intangible rights theory to "de facto" officials. The government attempts to hide behind the "clearly erroneous" rule in order to shield from scrutiny the evidence in this case. Here, a political party leader made suggestions with respect to one class of activities within the domain of the State insurance commissioner. By his own testimony, insurance matters accounted for less than one percent of Hunt's time as the head of the Democratic party. C.A. App. 229; 1 Tr. 18. While it may not be "clearly erroneous" to find that Hunt "controlled" the decisions concerning Wombwell, it defies common sense to compare him to any real public official. In fact, he cannot be meaningfully compared to the only other party leader who has been convicted under this theory. See *United States* v. *Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (describing Margiotta as having a "stranglehold" on local government in which "everything went through his hands"). Because the government's theory is so nebulous, it is possible to convict virtually any party official who has significant political influence. Such a clear danger to the political process should be permitted only if Congress has unambiguously indicated that this is a risk it believes is necessary to further the public interest. Congress has made no such finding in Section 1341.[13]

[12] The government's suggestion (U.S. Br. 35 n.27) that the federalism principles discussed in *Bass* do not apply because the issue here is not jurisdictional is a complete *non sequitur*. Whether the basis for the expansion of a federal criminal statute is a prosecutor's misreading of a jurisdictional requirement as in *Bass* or a misreading of a substantive portion of the Act, such as here, is wholly immaterial. The result is the same: federal criminal laws are being applied to conduct that the states can and should regulate exclusively unless Congress clearly expresses its intent to make that conduct a federal criminal offense. The federalism issue is, of course, more pronounced here when a state party official is being prosecuted for his failure to disclose his patronage activities on behalf of the state executive.

III.

The government concedes (U.S. Br. 36 n.28), as it must, that petitioner Gray's conviction for conspiracy cannot stand if his conviction for the substantive offense of mail fraud is overturned. Thus, the parties agree that the conspiracy issue is relevant *only* if the Court rejects petitioner Gray's submission in parts I and II, *supra*.

With regard to petitioner Gray's contention that a reviewing court must consider the legal sufficiency of the evidence concerning *all* of the objects of a conspiracy, the government concedes that it is "possible that the jury concluded that petitioners conspired to defraud the government of tax revenues and also concluded that they did *not* conspire to violate the mail fraud statute." U.S. Br. 37 (emphasis added).[14] Thus, it would seem to follow

[13] The government's theory of fraud has no limit. If "dishonesty" or "bias" by a "de facto public servant" is sufficient, then federal prosecutors have carte blanche authority to seek indictments against any powerful political leaders. Of course, if Congress considers it in the public interest for state political leaders to be subjected to federal prosecutions for "dishonest" or "biased" patronage decisions they make in which they employ the mails, it almost certainly has constitutional authority to do so. *Badders* v. *United States*, *supra*. It seems inconceivable that Congress would ever pass such a law.

[14] The government asserts that "[t]here is no serious issue as to whether petitioners and Hunt acted in concert . . . concerning Seton . . . and they do not argue that question before this Court." U.S. Br. 37. It was certainly an issue at the trial and there was plenty of

necessarily that the sufficiency of the evidence as to *both* objects should be reviewed before a conviction is upheld. The government, however, does not reach this conclusion because in its view "[t]here is . . . no reason to waste judicial resources" (U.S. Br. 37); the government has satisfied *itself* that the jury must have found petitioners guilty of conspiracy to commit mail fraud.[15] On this basis the government distinguishes all of this Court's decisions relied upon by petitioner. Gray Br. 37-41. But so long as it remains "possible" that the jury convicted solely on the tax fraud object, "it is *impossible* to tell which ground the jury selected." *Yates* v. *United States*, 354 U.S. 298, 312 (1957) (emphasis added). Nothing the government says can make it any more certain how the jury in this case reached its verdict than the juries in *Yates* or *Cramer* v. *United States*, 325 U.S. 1, 36 n.45 (1945). If *"certainty"* is the standard, as this Court's decisions clearly indicate it is, then the jury verdict cannot be upheld without regard to the factual sufficiency of the tax fraud object of the conspiracy.

The government argues "alternatively" that the rule requiring reversal if one object of the conspiracy is legally deficient should be rejected if the defect is simply the inadequacy of the evidence presented. But the government does not and cannot argue that the legal sufficiency of the evidence is somehow an issue of lesser significance than other legal errors. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The "alternative" theory thus simply collapses into a restatement of the first argument, which is that the court should not indulge "an assumption that the jury acted irrationally." U.S. Br. 42. But the truth is the jury may have and the only way to protect against that possibility is to require the reviewing court to review the sufficiency of the evidence as to all of the objects of the conspiracy presented to the jury.[16]

Another way to view the government's contention concerning the objects of the conspiracy is that the government in effect argues that the failure to prove one or more objects of a conspiracy included in the instructions to the jury is *per se* harmless error. That is, the reviewing court could never find prejudice from such an erroneous instruction. This implicit rule is, however, utterly unprecedented. It is settled that the prejudice created by trial error should be evaluated in light of the entirety of the case. *United States* v. *Lane*, 106 S. Ct. 725, 731 (1986); *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) ("any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the harmless error statute] but also to the expressed intent of its legislative sponsors"). Here the government seeks to pretermit any inquiry into the nature of the error. The more appropriate approach is to require the sufficiency of the evidence to be reviewed and, if the court of appeals finds that the jury instruction including the separate object of the conspiracy was er-

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evidence from which the jury could have concluded that there was no concert of action between petitioners and Hunt concerning the creation and operation of Seton. By not addressing the issue of conspiracy, petitioners did not intend to concede that no factual differences existed on that issue. There simply was no legal issue before this Court on that part of the case.

[15] What makes the government's argument particularly weak is that the jury was instructed—incorrectly by all accounts (U.S. Br. 11 n.9)—that tax fraud was a separate part of the substantive mail fraud conviction. Thus, it is plausible that the jury's verdict constituted a complete rejection of the government's case with respect to political patronage and was based solely on the tax fraud theory put forward by the government in both counts.

[16] The government misses the mark when it asserts that petitioner's rule requiring appellate review of the evidence concerning all objects of a conspiracy is premised on "a presumption that juries behave irrationally." U.S. Br. 41. The theory underlying the contention is that no one can fairly determine how a jury reached its conclusion and no one can substitute—as the government attempts to do—for the jury. To require review here is no different than requiring review of the sufficiency of the evidence in any other context. It simply recognizes that juries err.

roneous in light of the absence of necessary evidence, then the court should evaluate whether the error was harmful. In general, the harm should be apparent for the reasons already discussed, but as indicated (note 15, *supra*), the potential for prejudice in this case is particularly acute because the jury was improperly instructed on the tax element of the substantive mail fraud count.

In arguing simply for a rule of convenience, the government ignores the magnitude of the relevant interests implicated by this issue. The defendant, whose liberty is at stake, asks no more than reasonable assurance that he will not "be made to suffer the onus of a criminal conviction except upon sufficient proof" that each theory the government itself has *chosen* to present to the jury is legally sufficient, *i.e.*, supported by sufficient evidence, to sustain a conviction. *Jackson* v. *Virginia*, 443 U.S. at 316. The government makes no attempt to show that such a requirement would be burdensome to it or to a reviewing court.[17] Accordingly, appellate review of the sufficiency of the evidence as to the object alleged should be required in order to uphold a defendant's conviction for conspiracy. Because the court of appeals refused to undertake such an inquiry, a remand on this issue is in

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[17] Somewhat uncharacteristically, the government makes *no* effort to show that there is sufficient evidence in this case to support petitioners' conviction for conspiracy to engage in tax fraud.

The government takes offense at our claim that under the logic of its theory it could charge objects of a conspiracy, not prove them and nevertheless insist that they be submitted to the jury. The fact that the government cannot do this under the Federal Rules of Criminal Procedure and due process does not enhance the government's case. To the contrary, it merely shows how weak the government's *theory* is in precluding an appellate court from reviewing this issue. If the trial court should take the issue away from the jury when there is insufficient evidence, then a reviewing court should be required to review the propriety of the district court's decision to submit the issue to the jury.

order if the Court does not reverse petitioner Gray's conviction under 18 U.S.C. § 1341.

CONCLUSION

For the foregoing reasons and those stated in petitioner Gray's opening brief, the decision of the court of appeals should be reversed.

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REPLY BRIEF

Nos. 86-234, 86-286

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES J. McNALLY,
JAMES E. GRAY - - - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF FOR PETITIONER McNALLY IN No. 86-234

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QUESTION PRESENTED

Whether the mail fraud statute was improperly expanded to include a person who holds no position in government on an "intangible rights" theory that he owes a fiduciary duty to the citizens of the state because he exercises influence over some decisions of a state official.

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REPLY BRIEF FOR PETITIONER McNALLY IN No. 86-234

PURPOSE OF THIS REPLY BRIEF

The purpose of this Reply Brief is to expose misleading contentions in the Brief for the United States, and to clarify the argument raised in this proceeding.

ARGUMENT

Intangible Rights Case

This case is an intangible rights case. It is amazing that at this late stage the government is now attempting to characterize this case as a money or property tangible rights case. For example, the government contends that "it is clear that the primary objective of the scheme was to obtain money and other property for

petitioners and Hunt by deceit and trickery." [Brief for the United States, p. 19.]

This case has always been an intangible rights case. In the district court, the government perceived and prosecuted the case as an intangible rights case. *See* Memorandum of Law: Intangible Rights Under the Mail Fraud Statute, filed by the government in mid-trial, on February 16, 1984, Docket Entry 105; T.E. XVII: 4; Appendix herein. In this mid-trial memorandum, the government clearly characterized the case as an intangible rights case.

> The Government contends that the evidence adduced in its case-in-chief establishes that the Defendants were associated with a scheme to defraud the citizens of Kentucky of their intangible right to honest, impartial government. [Memorandum, p. 1; Appendix, p. 2a.]

The government further stated:

> The evidence in this case clearly shows a scheme to defraud the public of its intangible right to honest, impartial actions by government officials as a result of actions by Gray and also as a result of actions by Hunt. [Memorandum, p. 3; Appendix, p. 4a.]

Petitioners were tried on an intangible rights theory and were convicted on that basis in the district court.

In the Sixth Circuit Court of Appeals, the government clearly acknowledged the case had been prosecuted as an intangible rights case.

> The evidence established that the appellants were associated with a scheme to defraud the citizens of Kentucky of their intangible right to honest and impartial government. [Brief for the Plaintiff-Appellee United States of America, United States Court of Appeals for the Sixth Circuit, Nos. 84-5400/5401, p. 33.]

The Sixth Circuit Court of Appeals perceived the case as an intangible rights case and rendered its decision in intangible rights terms. *United States* v. *Gray,* 790 F. 2d 1290, 1294-1296 (1986).

In light of the above circumstances, Petitioner McNally respectfully submits that it is wholly inappropriate for the government to now contend in the Supreme Court that this is not an intangible rights case.

Patronage, Not Fraud

Petitioner McNally was a recipient of political patronage, not a perpetrator of mail fraud.

At the time he shared insurance commissions, Petitioner McNally was a licensed insurance solicitor. [T.E. XIII: 27, 30-31.] McNally had gone to the state capital and had taken and passed the insurance examination to obtain his license. [T.E. XIII: 27, 30-31.] At the time McNally received insurance commissions, it was lawful to share insurance commissions with a licensed agent or solicitor.

> The Court: But was it against the law at that time to share insurance commissions with a licensed agent? It was not, was it?
>
> Prosecutor: It was not. [T.E. XXIV: 57.]

See, Kentucky Revised Statutes §304.9-420, repealed 1984, effective throughout time frame of indictment and proof.

For every penny McNally received in insurance commissions, he reported same as personal income on his tax returns. [T.E. XXIII: 52, 57, 58, 60.] Even the case agent acknowledged that McNally paid taxes on *all* the money he received in shared commissions or otherwise.

> Defense Counsel: You have no reason to believe, at this point, whether it's amended or otherwise, that Mr. McNally did not pay taxes on all the money that he received, either through the Snodgrass Insurance Agency via Wombwell or from the sale of the stock in Seton Investments?
>
> Case Agent: No, sir. [T.E. XVII: 132.]

"I have paid every cent of taxes that my CPA's have said that I owe on any and everything." [McNally, T.E. XXIII: 52, 57-58.] Likewise, with regard to McNally's involvement in the Seton corporation, the case agent acknowledged that Seton reported all sums received and designated same as insurance commissions on its tax returns. [T.E. XVII: 124-125.]

> Defense Counsel: And whatever money Seton received, you acknowledge it paid income tax on, do you not?
>
> Case Agent: Yes, it did. [T.E. XVII: 144.]

An I.R.S. accountant stated that Seton checks and deposit slips were clearly identified as to what they were, that there was no attempt at concealment of the

source of money [Wombwell commissions] to Seton, and that there was no attempt to conceal where the Seton checks were going. [T.E. XVIII: 40-41.]

In every way, as far as Petitioner McNally was concerned, he was participating as a private citizen in completely legal and traditional political patronage. Insurance commission sharing at the direction of the Governor's office had been a traditional form of political patronage for many years in Kentucky. [T.E. I: 13, 89; II: 25, 31; VIII: 5, 6.] Commissioner of Insurance McGuffy testified there was nothing wrong or illegal about sharing insurance commissions with a licensed agent. [T.E. II: 30, 39.]

Petitioner McNally never had a fiduciary duty towards the citizens of Kentucky. No one has ever contended McNally was an elected official or any kind of de facto official. McNally never shared insurance commissions as a result of any scheme or fraud; he received insurance commissions because he was a licensed insurance agent legitimately benefiting from well-deserved political patronage.

The above facts have been set forth to illustrate just how far the mail fraud statute has been expanded in this case—to prosecute and convict a political partisan, having no fiduciary duty to the citizenry, who happened to receive legal and traditional political patronage in the form of shared insurance commissions. The consequences of approving the expansion of the mail fraud statute to cover private patronage recipients would be devastating to the landscape of American politics.

As the Solicitor General acknowledges in the Brief for the United States, "this Court has yet to confront the issue of intangible rights under the mail fraud statute." [Brief for the United States, p. 26.] Now confronted with this issue, it is respectfully submitted that the mail fraud statute should not be expanded to include *any* intangible rights theory of prosecution but, if so expanded, the mail fraud statute should not be so broadly expanded as to include an intangible rights theory of prosecution against private patronage recipients.

Two Misleading Contentions

Two misleading contentions in the Brief for the United States need to be corrected.

1. The Brief for the United States repeatedly contends that this case involves "a complex subterfuge" resulting in "the fraudulent misappropriation of governmental authority to pursue illegal ends," etc. [Brief for the United States, pp. 14, 16, 27, 29.] On the contrary, this case involves political patronage. Indeed, in view of the facts set forth above in this Reply Brief and elsewhere in the record of this case, this is a case in which Petitioner McNally received lawful and traditional political patronage.

2. The Brief for the United States contends that "McNally's argument that 'Hunt was not a de facto public official' is totally without merit." [Brief for the United States, p. 33.] On the contrary, Petitioner McNally's conclusion that Hunt was acting as the Democratic Party Chairman, and not pursuant to "a

stranglehold" on government affairs as a whole [cf., *United States* v. *Margiotta*, 688 F. 2d 108, 122 (2nd Cir. 1982), cert. denied 461 U. S. 913 (1983)], is a conclusion supported by the record in this case and has complete merit, for the reasons heretofore set forth in the Brief for Petitioner McNally, at pp. 16-22.

CONCLUSION

For the reasons set forth above, together with the reasons set forth in the Brief for Petitioner McNally (No. 86-234)* and in the Brief and Reply Brief for Petitioner Gray (No. 86-286), consolidated herewith, it is respectfully submitted that the decision of the Sixth Circuit Court of Appeals affirming the district court's expansion of 18 U.S.C. §1341 should be reversed.

Respectfully submitted,

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*Errata. At line 9 of the last paragraph of page 11 of the Brief for Petitioner McNally in No. 86-234, heretofore filed herein, the date 1972 should read 1872.

APPENDIX

CRIMINAL DOCKET EXCERPT

GRAY, JAMES E. — Indictment No. 83-10

DATE	DOCUMENT NO.	PROCEEDINGS
2-16-84	105	Memorandum of Law of U. S.: Intangible Rights Under the Mail Fraud Statute.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Criminal No. 83-10

UNITED STATES OF AMERICA - - - - *Plaintiff*

v.

JAMES E. GRAY and
CHARLES J. MCNALLY - - - - *Defendants*

MEMORANDUM OF LAW: INTANGIBLE RIGHTS UNDER THE MAIL FRAUD STATUTE

Comes now the United States of America, by and through counsel, and hereby submits this Memorandum of Law regarding the Intangible Rights Doctrine as it has developed under the federal Mail Fraud Statute, 18 USC §1341. The purpose of this Memorandum is to set forth the United States of America's position as to the application of this Doctrine to the case at bar.

A. COUNT 1—CONSPIRACY (MAIL FRAUD OBJECTIVE).

I. *Depreciation of the Right to Honest and Impartial Government.*

The Government contends that the evidence adduced in its case-in-chief establishes that the Defendants were associated with a scheme to defraud the citizens of Kentucky of their intangible right to honest, impartial government.

The intangible rights doctrine holds that the citizens' right to honest and impartial government is deprived when a public employee's official conduct is influenced by a per-

sonal financial interest. In *Shushan* v. *United States*, 117 F. 2d 110 (5th Cir.), *cert. denied*, 313 U. S. 574 (1941), an indictment was sustained that alleged that a member of a public board used his influence to obtain approval for refunding bonds without disclosing that he would receive a percentage of the profit. The Fifth Circuit found that this scheme could be punished not only as an attempt to bribe or to obtain money unfairly, but also as a "scheme to defraud the public." *Id.* at 115. "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud. *Id.*

The intangible rights doctrine is now a well-accepted principle of law. For example, in *United States* v. *Mandel*, 591 F. 2d 1347, 1362 (4th Cir. 1979), the Fourth Circuit affirmed the conviction of the governor of Maryland for accepting bribes as an inducement to support legislation:

> "It is clear from *Shushan* and its many following cases that the fraud involved in the bribery of the public official is not exercising his independing judgment in passing on official matters. (Cite omitted.) A fraud is perpetrated upon the public to whom the official owes fiduciary duties, e.g., honest, faithful, and disinterested service . . . While outwardly purporting to be exercising independent judgment in passing on official matters, the official has been paid for his decisions, perhaps without even considering the merits of the matter. Thus, the public is not receiving what it expects and is entitled to, the public official's honest and faithful service."

See also, *United States* v. *Margiotta*, 688 F. 2d 108, 125 (2d Cir.), *cert. denied*, 103 S. Ct. 1891 (1982) (fiduciary duty to citizens requires "disinterested conduct"); *United States* v. *Keane*, 522 F. 2d 534, 546 (7th Cir. 1975), *cert. denied*, 424

U. S. 976 (1976) (fiduciary duty breached when official passes judgment on matters directly affecting an undisclosed personal financial interest). *Cf., United States* v. *Rabbitt,* 583 F. 2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U. S. 1116 (1979) (mail fraud statute prohibits receipt of bribes or kickbacks by official "in the course of conduct of his office").

The evidence in this case clearly shows a scheme to defraud the public of its intangible right to honest, impartial actions by government officials as a result of actions by Gray and also as a result of actions by Hunt.

First, the Government contends that the jury could find a deprivation of the public's right to honest Government on the basis of the actions taken by Hunt. The Court of Appeals for the Second Circuit recently decided a case involving facts that are strikingly similar to this case, *viz.,* a prosecution involving a powerful, non-elected political leader who directed the distributions of commissions resulting from the Government's purchase of insurance. In *United States* v. *Margiotta,* 688 F. 2d 108 (2d Cir. 1982), *cert. denied,* 103 S. Ct. 1891 (1982), the Second Circuit held that the public's right to honest government could be impaired by actions taken by the non-elected political leader because he had actual control over government decision making. As have other cases, see, *e.g., Mandel,* 591 F. 2d at 1363; *Shushan,* 117 F. 2d at 115, *Margiotta* explained the deprivation of the public's right to honest government by a public official as a breach by the public official of his fiduciary duty to the citizenry to perform his or her duties honestly and faithfully. Building on this analysis, *Margiotta* looks to private sector fiduciary duty cases and finds that a formal employer-employee relationship is not a prerequisite to a finding that a fiduciary duty is owed. 688 F. 2d at 121. Thus, *Margiotta* reasons that a person who defrauds the public of its right to good government should

not be allowed to escape liability merely because he or she is not on the public payroll. *Id.* at 121 and 124. Drawing on traditional fiduciary duty and trust law, *Margiotta* holds that a private persons' involvement in government is subject to the mail fraud statute only if (1) others rely upon him or her for the making of government decisions, and (2) he or she in fact has actual control over governmental decisions. 688 F. 2d at 122.

Even under this narrow, exacting test enunciated in *Margiotta,* the Government contends that the evidence establishes that the mail fraud statute is applicable to Hunt's governmental actions. The evidence clearly demonstrates that McGuffey, as Commissioner of Insurance, relied on Hunt in making decisions about the Commonwealth's distribution of insurance commissions. The evidence also shows that Hunt in fact exercised control over governmental decision making. Hunt dictated to McGuffey the manner in which insurance commission proceeds should be distributed and to whom the various state contracts, including workmen's compensation, should be awarded. Moreover, Hunt knew there were less expensive means available for the state Workmen's Compensation policies because when threatened with self-insurance, he suggested to Tabeling that a less expensive means be located.

Hunt's performance of these functions constituted a deprivation of the public's right to honest and impartial government. In exercising his control over the distribution of insurance commissions, Hunt was influenced by his undisclosed personal interest in the distribution. Hunt had a personal interest because he profited from commission payments made to Seton. As explained above, the public's right to honest and faithful Government is deprived when, as here, the performance of governmental functions and decision making is influenced by undisclosed personal interest.

Both Defendants Gray and McNally aided and abetted Hunt in this scheme. Gray and McNally's participation in the scheme is most clearly demonstrated by their creation and maintaining of the corporate shell Seton to be a depository for the excess commissions which were directed by Hunt to Seton.

Second, Defendant Gray deprived the public of its right to his honest and faithful service by taking actions as a public official of the Commonwealth of Kentucky that were influenced by his undisclosed financial interest in Seton. While Gray was Secretary of Public Protection and Regulations, the Insurance Commission was one of the eight agencies supervised by Gray. Moreover, Gray has the statutory duty to supervise the Department of Insurance. Even though Gray knew about commission splitting and knew commissions would go to Seton, he chose not to intervene to halt the practice of illegal commission splitting. Gray's knowledge is clearly shown by the evidence. For example, McGuffy testified that Gray arranged the split of commissions to Paulie Miller and told McGuffy to contact Wombwell. Hunt testified that Gray knew Wombwell checks would be sent to Seton. This decision not to intervene was obviously motivated by Gray's financial stake in the continuation of the procedure by which the Commonwealth purchased insurance. McNally assisted Gray in this fraud by consenting to act as the "front" man for Seton, thus disguising Gray's interest.

II. *Deprivation of Relevant and Pertinent Information.*

Moreover the evidence in this case establishes a deprivation of the public's right to all information relevant and pertinent to insurance purchasing in two conceptually-distinct manners. First, Gray and Hunt's allowing undisclosed financial interest to influence their official conduct, discussed in the preceding section, can be seen as a deprivation of the public's right to information about the undisclosed interests. Treating this misconduct as a deprivation of information, rather than as a deprivation of honest government, is simply an alternative method of expressing why the conduct is wrongful. The United States does not contend that deprivation of information about the undisclosed interests that influenced the conduct of Gray and Hunt is conceptually distinct from deprivation of the public's right to honest and impartial government. See *Margiotta,* 688 F. 2d at 121 and 128 (using interchangeably the concepts of right to honest government and right to information concerning conflicts of interest); *Mandell,* 591 F. 2d at 1363.

The evidence in this case also demonstrates a non-disclosure of information that impaired a second, distinct right of the public to information. Specifically, there was a deprivation of the public's right to information relevant to governmental affairs that is possessed by a public official, which information must be disclosed even if the information does not influence the official's performance of his governmental duties. This right finds its source in the right of the public to have its officials act on true information in governmental decision making. *Mandel,* 591 F. 2d at 1364; *United States* v. *Bush,* 522 F. 2d 641, 647 (7th Cir. 1975), *cert. denied,* 424 U. S. 977 (1976). As explained below, in some respects this right is more limited than the public's unlimited right to information that influences a public official's performance of his or her duties. In other respects, however, this second right is more expansive because it prohibits misrepresentations even by persons who are not public employees. See, *e.g., United States* v. *Curry,* 681 F. 2d 406, 411 (5th Cir. 1982).

The scope of the public's right to information that is relevant to governmental affairs is defined in *Mandel, Bush,* and *Curry.* As explained earlier, *Mandel* involved the

prosecution of the governor of Maryland for accepting bribes in exchange for influencing the passage of horse-racing legislation. The Fourth Circuit held that these facts constituted an actionable mail fraud under two distinct theories. First, the defendant's failure to disclose a direct interest in a matter he was passing on defrauded the public's right to honest government. 591 F. 2d at 1363. Second, and more important here, the concealment of information from public bodies was a fraudulent deprivation of information:

> "The other situation applicable here in which we think fraudulent non-disclosure or concealment of facts may be evidence to support a conviction under the mail fraud statute is when there has been a fraudulent statement of facts, or a deliberate concealment thereof, to a public body, in order to receive a benefit by action of the public body."

591 F. 2d at 1364. Applying this legal principle to the facts of *Mandel*, the Fourth Circuit found an actionable fraud because "false information was presented to or true information concealed from, the Maryland General Assembly or Maryland Racing Commission, or both, in order to induce those bodies to take favorable action toward those interested in [the racing legislation]." *Id.* It is important to note that the Fourth Circuit was not concerned with whether the governor's non-disclosure of information had any fiscal impact on the State. In fact, the legislation that the governor was supporting proposed to increase the number of horse racing dates in the state, *Id.* at 1355, which would have increased Maryland's tax revenues on betting receipts.

A similar analysis is presented in *Bush*, which involved the prosecution of a Chicago mayoral aide who promoted the award of a city contract to a company in which the

defendant had an interest, without disclosing his interest. *Bush* holds that the defendant's actions constituted an actionable fraud because the defendant's failure to disclose his interest deprived the city of his honest and faithful services and was coupled with material misrepresentations to city officials and an active concealment of the true facts. 522 F. 2d at 648. Because the actionable harm was simply Bush's failure to disclose his interest, it was irrelevant that the contract awarded to the city contained extremely favorable terms for the city. "[T]he mail fraud statute seeks to prohibit fraudulent conduct regardless of ultimate loss or damage to the crime." *Id.* Additionally, the Fourth Circuit explicitly approved an instruction to the jury that "the fact that the defendant did not himself have responsibility for the evaluation, awarding, or administration of contracts does not change his duty of disclosure." 522 F. 2d at 652. The Fourth Circuit makes perfectly clear that the vice in the defendant's conduct was a non-disclosure of information that potentially deprived the city of full information in negotiating the contract, which information was concealed so that the defendant might profit. *Id.* at 648.

In *Curry*, the defendant was a chairman of a citizens' political action organization who embezzled funds belonging to the organization. To conceal his embezzlement, the defendant filed false financial reports for the organization with the State Election Supervisory Committee, which reports were required to be filed by state law. These reports were similar to the Financial Disclosure Reports filed by Gray. The Fifth Circuit held that this constituted a fraudulent deprivation of the Supervisory Committee's "right to obtain time and correct financial disclosure reports" and of the citizens' derivative right "to be fully informed of the financial activities and relationships of political committees and candidates for public office." 681 F. 2d at 411 and n. 10. *Curry* holds that this deprivation is actionable under

the mail fraud statute even without any showing that the Supervisory Committee (or any other part of state government) would have acted differently if true reports had been filed or any showing that any party received tangible benefits as a result of the non-disclosure. *Id.* at 418 (Garwood, J., dissenting).

This right of the public to material information, as explained in these cases, clearly was impaired by the actions of defendant Gray. Under even the narrowest reading of *Mandel, Bush,* and *Curry,* a public official has committed a fraudulent deprivation of the public's right to information when he or she fails to disclose information that is pertinent to governmental decision making and the nondisclosure is coupled with active concealment and/or misrepresentations. The evidence shows that Gray possessed information about his undisclosed financial interest in Seton. The existence of Gray's interest in Seton, if disclosed, could have alerted Kentucky officials to scrutinize more closely the arrangement by which workers compensation insurance was purchased by the Commonwealth.

The evidence also shows active concealment and misrepresentations by Gray concerning his interest in Seton. Gray actively concealed his interest by the elaborate corporate fiction established to disassociate Gray from Seton and to "launder" Gray's financial benefits channeled through Seton. Gray actively misrepresented his interest in state government by filing a false disclosure of his financial holdings, which failed to disclose his interest in Seton, much like the defendant in *Curry*. Obviously, this false filing was intended to conceal this interest from State officials who might have recognized Gray's conflict of interest, which could have motivated the officials to scrutinize the commission splitting scheme. Gray's active concealment and misrepresentation of his interest in Seton defrauded the public of its right to have this information available to

those officials of the Commonwealth who might have scrutinized the commission splitting scheme, had the information been available to them. McNally's actions clearly show his agreement and cooperation in assisting Gray and Hunt in the concealment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted to the Court that the United States of America has clearly established the applicability of the Intangible Rights Doctrine to this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served by hand delivering same to: Honorable James Shuffett, Honorable William E. Johnson, and Honorable Frank E. Haddad, Jr., on this the 16th day of February, 1984.

(s) Marianna J. Read
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